109 *(Amended Answer.)*

GEORGIA, *Fulton County:*

And now comes the defendants in the above stated case and amend their answer heretofore filed and in response to paragraph 1 of the amended petition of complainants this day filed, answer and say:

(1.) It is true that the Act of 1885 of the General Assembly of Georgia as construed by the Supreme Court of Georgia authorized and demanded that a tax be levied against stock held by residents of the State of Georgia in corporations whose physical property is located beyond the limits of the State of Georgia, otherwise than herein admitted, said paragraph is denied. The Supreme Court of Georgia in the decision referred to by petitioner in its said paragraph 1 held as follows:

"The failure of the taxing authorities to directly tax shares of stock in domestic corporations, whose property is located in Georgia as property in the hands of the shareholders (the corporate property being taxed instead) while levying a direct tax upon shares of stock in foreign corporations whose property is outside the State belonging to citizens of Georgia, is not a denial to the holder of the foreign shares of the equal protection of the laws."

The Supreme Court in the same decision further holds, as follows:

"It is not in this case necessary to determine whether shares of stock in a domestic corporation in the hands of a stockholder are
110 required to be taxed as such in order to comply with the uniformity clause of the Constitution. Nor is it necessary to determine, if domestic shares are taxable, whether it would be double taxation to assess them for taxation in the hands of the shareholder and also include them in the return made by the president of the corporation as required by law."

(2.) Answering paragraph two, it is not true under the laws of Georgia that the taxing authorities have exempted domestic shares and required foreign shares to be taxed, but on the contrary the officers have taxed both by levying the tax directly upon the foreign shares and upon the domestic share by levying the tax on the property of the corporation. In doing this it is denied that the action of said taxing officers is a denial of the equal protection of the laws as contemplated by the 14th Amendment of the Constitution of the United States.

(3.) Answering paragraph 3 of the petition defendants say, it is denied that it is the practice of the taxing officers of this State to receive property, corporate or individual, at two-thirds of its market value. On the contrary it is the practice of the officers of this State, as well as the requirement of the Constitution and law of this State, that all tax payers shall return their property for taxation at its true market value. It is specifi-ally denied that the shares of stock in said Western Railway of Alabama, which have been assessed
111 for taxation against petitioner by the said Wm. A. Wright, Comptroller General, and from 1895 to 1905 inclusive, are assessed at exceeding their full market value. It is further denied

that the valuation set up and claimed by the petitioners in said amended petition and exhibits thereto, is the true and correct market value of said stock for taxation, but on the contrary allege that the true market value of the same is that which has been fixed by the Comptroller General, as set forth in the executions issued therefor.

(4.) Answering paragraph 4 it is denied that defendant, Wm. A. Wright, Comptroller General, has assessed the property of the petitioners at its full value and the other property of the State, including railroad property, at two-thirds of its value.

(5.) Answering paragraph 6 defendants deny that the list thereto attached marked Exhibit B, in which petitioner alleges that the valuation placed therein on the Western Railway of Alabama, is the true market value of said stock, but on the contrary the true market value of said stock is as assessed by the Comptroller General, and pray that the Court may so find and decree.

(6.) Answering further the foregoing paragraphs of the petition defendants say that whether or not petitioner acted in good faith and with no intent to conceal its ownership of the 15,000 shares of Western Railway of Alabama stock, and with no intent to omit property that was taxable, or to conceal any property that was taxable, is not an issuable question in this case, nor is it material whether
112 petitioner did act in good faith or not in its return. Defendants deny under the decision in this case the relevancy of the allegation concerning the years from 1893 to 1895. They deny that because the Comptroller General accepted the returns wherein the stock was omitted, the State was thereafter barred from calling upon petitioner to return said property and upon his refusal, to assess it for taxation from the best information he could procure. Defendants deny that such action on the part of the Comptroller General was taking petitioners property without due process of law. Further answering the allegations in said paragraph defendants say that petitioner was afforded the right and opportunity to be heard, was invited and requested to make returns of such omitted property when the same was discovered; and that the Comptroller General assessed the same only after petitioners has neglected and refused to return its property for taxation; that the petitioners were offered every opportunity to be heard on the question of valuation of said stock for each and every year involved; that had petitioners returned the said omitted property as required by law, and as was its duty to do, it would have had every opportunity to contest with the State its taxability, its value, and every other question that it chose to raise, prior to said execution.

Further answering the allegations in said petition defendants deny the method adopted by the Comptroller General in fixing the
113 value of said stock in the assessment for back taxes, was an improper method, or that it reached a result far in excess of the real value of said stock during any of the years for which any of the assessments were made, or in excess of the valuation put upon other similar stocks during said years.

Defendants deny that there has been any discrimination in the method or in the result reached in assessing the value of these shares of stock, though in point of fact defendant has not had occasion to

assess any other similar stock similarly situated, for the reason he has not been able to discover any other shares of stock in a foreign corporation held and owned by citizens of Georgia.

Further answering the remaining allegations in said paragraph, to the effect that said shares of stock were over-valued in said assessments, defendant, Wm. A. Wright, Comptroller General, denied the allegations and avers on the contrary that the said shares were assessed at their reasonable true market value and from the best information he could procure. Defendant denies specifically and emphatically the correctness of the values attached as an exhibit to said amended petition, but on the contrary avers that the value which the defendant, Wm. A. Wright has heretofore assessed said stock is the true market value.

Defendants having fully answered said amended petition pray that they now be discharged with their reasonable costs.

JOHN C. HART, *Att'y Gen'l.*
BOYKIN WRIGHT.

114 STATE OF GEORGIA, *Fulton County:*

Personally appeared before the undersigned, W. A. Wright, after being sworn says: That the allegations contained in the foregoing amended answer to the amended petition are true.

WM. A. WRIGHT.

Sworn to and subscribed before me, this Jan. 30th, 1906.

T. R. JEFFRIES,
N. P., Fulton Co., Ga.

Foregoing amendment, allowed and ordered filed. Jan. 30th 1906.

J. T. PENDLETON,
Judge S. C., A. C.

Filed in office this the 30th day of Jan. 1906.

T. H. JEFFRIES,
Deputy Clerk.

115 (*Amended Petition. Filed Jan. 30th,* 1906.)

GEORGIA, *Fulton County:*

And now comes the plaintiff, and by leave of the court, amends its petition heretofore filed in this case as follows:

(1.) Petitioner shows that by the decisions of the Supreme Court of Georgia construing the statutes of said State, it appears that since the year 1885 the law of said State has been that shares of stock in corporations chartered both by the State of Georgia, and in corporations chartered by other States, are taxable property and subject to be taxed, and that the equal administration of said laws requires the tax collectors and receivers of the State of Georgia, including the Comptroller General, to levy, and collect taxes equally upon all shares of stock, both in domestic and foreign corporations.

(2.) Petitioner avers that said tax collectors, including said Comptroller General, although well knowing that there were a large number of holders of stock in domestic corporations, have knowingly and purposely refrained from collecting taxes upon such shares of domestic stock or from the holders thereof, and that the tax receivers of said State of Georgia, including the said Comptroller General as a tax receiver, have failed and refused to demand the return, or cause to be returned or assessed for taxation shares of stock in domestic corporations against the holders thereof resident in the State of Georgia. That the action of said taxing officers of the state
116 of Georgia aforesaid in regard to domestic stock and the holders thereof, amounts as against your petitioner to a denial of the equal protection of the law contrary to the 14th Amendment of the Constitution of the United States, and is such denial of the equal protection of the law contrary to said amendment of said Constitution of the United States.

(3.) Petitioner avers that the taxing officers of the State, including the said defendant, William A. Wright, as a taxing officer, accepted returns of all property and assessed the value of all property which was assessed by them, of tax payers in said State at not exceeding two-thirds of its market value, and that the said Comptroller General accepts the returns of, and assesses railroad property in this State at not more than two-thirds of its market value, and that such has been and is the practice of said taxing officers and said Comptroller General since the year 1895 and before said time, and that said assessments and acceptances of returns for taxation as set forth at two-thirds of its market value is done knowingly, purposely and intentionally by the said taxing officers, including said Comptroller General. That the said shares of stock in said Western Railway of Alabama which have been assessed for taxation against your petitioner by the said William A. Wright, Comptroller General, *That the said shares of stock in said Western Railway of Alabama which have been assessed for taxation against your petitioner by the said William A. Wright, Comptroller General* and as to which he
117 is now endeavoring to collect taxes for the years from 1895 to 1905 inclusive, are assessed at exceeding their full market value said amount assessed being shown by Exhibit "A" to this amendment, and your petitioner avers that the said assessments are at least 75 per cent. over and above the market value of said stock for each and every year.

(4.) Petitioner shows that the action of said William A. Wright in assessing at said sums set forth in said Exhibit "A" the said stock of said Western Railway of Alabama, which taxes are claimed against your petitioner by the said William A. Wright and the other taxing officers of said State, and assessing for taxation the other property of said State, and especially the railroad property of said State, at not exceeding two-thirds of its market value approximately, under the acts herewith set forth is a denial to your petitioner of the equal protection of the law, contrary to the 14th Amendment of the Constitution of the United States.

(5.) Petitioner shows that the market value of said shares of stock of the Western Railway of Alabama upon which said taxes have

been assessed against your petitioner, has been in each of said years as per list hereto attached, marked Exhibit "B" and made a part of this paragraph of this petition.

JOS. B. & B. CUMMING,
ALEX. C. KING,
JOS. R. LAMAR,
Att'ys for Petitioner The Ga. R. R. & Bg. Co.

118 *Value of Western of Alabama Stock for the Years* 1895-1904.

1895	$25
1896	25
1897	40
1898	45
1899	25
1900	25
1901	60
1902	70
1903	80
1904	90

Amendment allowed, Jan. 30th, 1905.

J. T. PENDLETON,
Judge S. C. A. C.

Filed in office this the 30th day of Jan. 1906.

T. H. JEFFRIES,
Deputy Clerk.

119 *(Consent Order.)*

By consent of counsel it is ordered that this cause be tried by the Court without a jury, with all right of exception and appeal or writ of error as if tried by the Court with a jury including the right to move for a new trial if deemed necessary or proper.

Jan. 30th, 1906.

J. T. PENDLETON,
Judge S. C. A. C.

(Decree.)

The above stated case having come on regularly to be heard and counsel having consented that it be heard both on the questions of law and fact by the Court without the intervention of the jury as per order this day taken; and after having duly considered all the evidence submitted, I find as follows on the question of fact:

(1.) The evidence submitted does not disclose any discrimination in the assessment and levy of the taxes on this stock in controversy compared with other property of the State.

(2.) The evidence submitted does not show that the value of the stock placed thereon by the Comptroller General is excessive.

(3.) I further find generally in favor of the Deft.

Wherefore it is ordered, considered and decreed by the Court that *fi. fas.* for taxes in favor of the State against the Georgia Rail-
120 road and Banking Company, for the years 1895 to 1904 inclusive proceed.

It is further ordered and decreed that the State recover its costs against the Petitioners for costs of the officers of Court.

Jan. 30th, 1906.

J. T. PENDLETON,
Judge S. C. A. C.

121 *(Motion for New Trial.)*

GEORGIA, *Fulton County:*

The above stated case having been tried before the Court without the intervention of a jury under a consent order passed therein January 30th, 1906, and findings and decree having been rendered therein in favor of the defendants in said cause, and the plaintiff being dissatisfied therewith, now comes the said plaintiff during the said term of court at which the said findings were made and decree was rendered and within thirty days from the rendition thereof, and moves the court to grant a new trial in said cause upon the following grounds, to-wit:

(1.) Because the said decree is contrary to law.

(2.) Because the findings in said decree are contrary to law and to the evidence in said cause.

(3.) Because the findings in said decree are without evidence to support them.

(4.) Because each finding of fact is decidedly and strongly against the weight of evidence in said cause.

(5.) Because the evidence submitted in said cause does disclose discriminations in the assessments and levies of the taxes on the stock in controversy in said cause compared with other property in the State which is taxed for each and every one of the years for which the tax *fi. fas.*, sought to be enjoined in said cause are directed to
122 proceed.

(6.) Because the evidence submitted in said cause shows that the value of the stock placed thereon by the Comptroller General is excessive, and causes said stock to be taxed to your petitioner at a valuation which is greatly in excess of the valuation placed upon the other property taxed in said State.

(7.) Because the Court erred in finding generally in favor of the defendants under the facts of said case.

(8.) Because the Court erred under the facts of said case in directing that the *fi. fas.* for taxes in favor of the State against the Georgia Railroad & Banking Company for the years 1895 to 1904 inclusive do proceed, and in not perpetually enjoining said *fi. fas.* and each of them, from so proceeding.

(9.) Because movent insists that it appears from the evidence that no shares of domestic railroad stock, or of stock in domestic corporations is taxed or assessed by the Comptroller General and other taxing officers of the State of Georgia, and that the shares of stock of

the petitioner in the Western Railway of Alabama are taxed; that under said facts and the law of this State such taxation of such shares to your petitioner while said shares of domestic stock are untaxed is a discrimination against your petitioner contrary to the Constitution of the State of Georgia (Art. 7, Sec. 2, Par. 1) which requires that all property within the territorial limits of the authority levying the tax which is subject to be taxed shall be taxed under uniform
123 laws.

(10.) Because movant insists that it appears from the evidence in said case that foreign shares of stock are held by citizens of Georgia other than your petitioner and the Central of Georgia Railway Company, and that no such holders of foreign shares of stock have been taxed by the taxing officers of said State, but that your petitioner and the said Central of Georgia Railway Company alone have been taxed upon the shares of stock which they hold in the Western Railway of Alabama; that such action on the part of the taxing officers of said State is knowing and intentional, and is a discrimination against said petitioner and denies to it the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

(11.) Because movant insists that it appears from the evidence in said case that the railroad property and other property returned and assessed for taxation in said State of Georgia is accepted for taxation by the taxing officers of said State at at least one-third below its fair market value, and that the stock of the Western Railway of Alabama involved in this case is taxed by defendant, Comptroller General, without any deduction from what the said defendants claim to be its market value; that such action on the part of said defendants is a discrimination against petitioner and denies to petitioner the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States.

124 (12.) Because movant insists that it appears from the evidence in said case that the railroad property and other property in said State returned and assessed for taxation is not taxed upon any valuation exceeding its market value, and that the stock of the Western Railway of Alabama in controversy in this case was taxed to your petitioner by the said Comptroller General at at least seventy-five per cent. above its market value; that this action on the part of the Comptroller General is a discrimination against your petitioner and denies to it the equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States.

(13.) Because movant insists that it appears the evidence shows that the railroad property and other property in this State which is returned and assessed for taxation is knowingly and intentionally accepted by the taxing officers of said State at at least one-third below its fair market value, and that the shares of stock of the Western Railway of Alabama which are taxed to your petitioner are taxed by the said Comptroller General at at least seventy-five per cent. above its fair market value; that such action on the part of the said Comptroller General is a discrimination against petitioner, and denies to

it the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

(14.) Because movant insists that it appears from the evidence that the Comptroller General in valuing the railroad properties in said State for taxation adopted as the method of finding said
125 valuation the capitalization of the net earnings of said railroads on the basis of six per cent. and of deducting therefrom approximately one-third of the value thus found, for the purpose of arriving at a proper valuation of said railroads for the purpose of taxation; that the Comptroller General in order to ascertain the value at which he should assess the stock of the Western Railway of Alabama for taxation adopted the same method, to-wit: capitalizing the net earnings of the Western Railway of Alabama for each year at six per cent., deducting therefrom the bonded indebtedness and treating the remainder as the valuation of said stock; that the said Comptroller General made no deduction of one-third or any other sum, from the valuation thus found, but assessed said stock without deduction at said valuation; that the said Comptroller General in so doing, and by so doing knowingly and intentionally discriminated against petitioner as the owner of one-half of said railroad stock in assessing the said stock for taxation; that the same was a discrimination against your petitioner as compared with other taxpayers, and that the same discriminates against petitioner and denies to it the equal protection of the laws contrary to the 14th Amendment of the Constitution of the United States.

(15.) Because movant insists that under the evidence introduced in said cause it appears that the assessments in controversy were made and the executions based thereon were issued without
126 due process of law in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the law under which the said Comptroller General assumed to make said assessments and issue said executions fixes no time or place for the hearing of any question as to the liability of petitioner to pay back taxes, nor for the determination of the question as to whether such property alleged to have been omitted was subject to taxation, or whether it was properly omitted, nor for the hearing of evidence as to the valuation of said property, and affords no notice of the time or place for any hearing, and affords no right or opportunity for the taxpayer to be heard as to the assessments of said back taxes.

(16.) Because movant insists that the evidence in this case shows that the said petitioner made its tax returns for each of the years involved in this case in good faith, and that the Comptroller General accepted said returns; and for the Comptroller General thereafter without any process of law to tax petitioner for said years on its property omitted in good faith from the prior accepted returns, was to deprive petitioner of its property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

(17.) Because the Court erred in not enjoining the said executions from proceeding for interest from the 20th day of December for each and every one of the years for which the said taxes were
127 alleged to be due, as in no event could interest have been calculated except from the date when the said property was

assessed for taxation, and the amount of taxes due thereon was ascertained by said Comptroller General.

(18.) Because movant insists that it appears from the evidence that in no event should interest have been allowed on any of the executions for the period between the 19th of April, 1902, and the 10th of January, 1905, during which period the Georgia Railroad & Banking Company was by the United States Court for the Northern District of Georgia in the case of Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company against William A. Wright, and the Georgia Railroad & Banking Company, enjoined from making any return or paying any taxes on said Western Railway of Alabama stock.

(19.) Because movant insists that under the evidence offered by the defendants and contained in the abstract of the record of said last named case in the United States Court, the Court erred in not enjoining the executions for taxes for the years 1902, 1903 and 1904, for that the said executions and assessments on which they issued were made prematurely, and the said executions and assessments are void, for that it appears that the Georgia Railroad and Banking Company was enjoined from making any return or in any way recognizing the liability of said stock for taxation, and the Comptroller General was enjoined from taking any steps for the
128 collection of taxes on said stock from April 19th, 1902, to January 10th, 1905, by a decree of the Circuit Court of the United States for the Northern District of Georgia in the case of the Louisville and Nashville Railroad Company and Atlantic Coast Line Company against William A. Wright and Georgia Railroad and Banking Company. That Georgia Railroad and Banking Company was not required to make, nor was the Comptroller General authorized to receive any return for taxation upon said shares during said time; and that said time should not be computed in determining whether or not this petitioner is in default, and that petitioner was entitled to the same time exclusive of said period, after the injunction was dissolved, in which to return said shares of stock that it would have had in the years 1902, 1903 and 1904, to make tax returns had no such injunction issued. That the time had not elapsed when said assessments were made by the Comptroller General on February 7th, 1905, nor had said time elapsed when said executions issued.

Wherefore and upon each and every of the grounds aforesaid the Georgia Railroad and Banking Company moves the court to grant a new trial and that a rule *nisi* do issue calling upon the defendants to show cause at a time and place to be fixed by the Court, why said motion should not be granted.

This February 1st, 1906.

JOS. B. & BRYAN CUMMING,
ALEX. C. KING,
SANDERS McDANIEL,
J. R. LAMAR,
Att'ys for Movant The Ga. R. R. & Banking Co.

129 Due and legal service of the foregoing motion for new trial acknowledged; copy rule *nisi*, time and all other and further service waived, and consent given that the Court may pass upon the said motion immediately.

This 2nd day of Feb. 1906.

JNO. C. HART,
Att'y Gen'l,
BOYKIN WRIGHT,
Att'ys for Def'ts.

Filed in office this the 2nd day of Feb. 1906.
T. H. JEFFRIES,
Deputy Clerk.

(*Ordered.*)

The foregoing motion for a new trial is approved; the facts stated therein are correct.

Upon consideration of the said motion, the same is overruled and a new trial denied. In open court, this 2nd day of Feb. 1906.
J. T. PENDLETON,
Judge S. C. A. C.

130 (*Brief of Evidence.*)

Superior Court of Fulton County, Georgia, January Term, 1906.

THE GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, Comptroller General, ET AL.

Equitable Petitioner for Injunction.

Decree in Favor of Defendants January 30, 1906.

Motion for New Trial.

The following is a brief of the material portions of the evidence submitted on the trial of the above stated case.

Where the contents of affidavits are set out herein, they were used by consent of both parties in open court, with the same effect as if the witness had appeared on the stand.

The following are the material parts of the evidence introduced by the plaintiff:

1st. A deed dated March 29th, 1883, from The Gorgia Railroad and Banking Company to The Western Railway of Alabama whereby The Georgia Railroad and Banking Company of the first part, "In consideration of One ($1.00) Dollar paid to it by the party of the second part, and of its agreement with The Central Railroad and Banking Company of Georgia for the organization of the Western Railway of Alabama and of the execution of a deed for its inter-

est in the property hereinafter conveyed by The Central Railroad and Banking Company of Georgia to the said Western Railway of
131 Alabama," The Georgia Railroad bargained and sold unto "The Western Railway of Alabama, to have and to hold to it, its successors and assigns forever, the following described property, viz:—its undivided one half (½) interest in and to the property known as the Western Railroad of Alabama, with all the franchises, rights and immunities of the Western Railroad Company of Alabama" being the property purchased by the Georgia and the Central on the foreclosure under decree in the case of Morris & Lowry *vs.* The Railroad Company of Alabama *et al.*, and dated September 1st, 1875—("Excepting, however, from the property conveyed by said deed the branch of said Western Railroad known as the Columbus branch, being the railroad extending from Opelika to Columbus, Georgia, which together with the depots and station houses and other lands of the said Western Railroad Company lying along said branch has been otherwise disposed of"); and in addition thereto all the cars, engines, lands and property since acquired by said purchases connected with or used by the said purchasers of the Western Railroad of Alabama.

"But these presents are made subject to a certain deed or lease between The Georgia Railroad and Banking Company and Wm. M. Wadley, dated May 7th, 1881, so that the party of the second part in these presents shall have no power to alter, modify or in anywise interfere with the terms of said lease without the consent in writing of the Lessor." Said deed was properly executed and attested, and duly recorded in the proper offices in the State of Alabama.

132 2nd. The annual Tax Returns of the Georgia Railroad and Banking Company of all property owned by said Company on the first day of May, 1878, particularly the entry in the column headed "Stocks or Shares owned by."

4,000 A. & W. P.	$400,000.00
1489⅜ Rome R. R.	100,000.00
18,000 N. C. & St. L.	65,000.00

Not liable for tax, the first two companies being railroad companies of this State and paying taxes for stockholders; and the last being a foreign corporation.

3rd. Annual tax returns of the Petitioner of all property owned by it on the first day of May, 1879, particularly the following entry in column headed "Stocks or Shares owned by."

4,000 shares Atl. & W. Pt. R. R. Co.	$400,000.00
1,489⅜ shares Rome R. R. Co.	100,000.00
Interest on Port Royal R. R. Co.	75,000.00
Interest in Western R. R. of Ala.	100,000.00

These stocks and interest in railroads as here set out that the Comptroller General's office may have a complete property return. They are not returns for taxation, because they are not under the laws of Georgia taxable in the hands of the owners or shareholders.

4th. Letter dated May 4th, 1889, from C. G. Goodrich, Cashier of The Georgia Railroad and Banking Company to Wm. A.
133 Wright, Comptroller General, as follows: "Augusta, Ga., May 4th, 1889. Hon. Wm. A. Wright, Comptroller General, Atlanta, Ga. My Dear Sir:—I have received your favor of the 3rd inst., and will amend the return of property, as required, so as to furnish the details wanted. As it is necessary to obtain these particulars from the Auditor's office, I have sent to him one of the forms and hope to have it ready for the mail on Monday next. In compliance with your request for an explanation—why "Company's cash on deposit" is deducted? The balance of "cash on deposit" in Company's statement is nothing but the remnant of the "net earnings" on which the ½ per cent. tax is paid under the charter. The Company has a deposit account in its own banking department—and in returning the assets of the banking department—such as "Overdrafts," "Loans and Discounts," "Sight Exchange" and "Cash"—this balance due the Company is deducted because of the fact that it is a part of the "Net Earnings" and already taxed as such. Yours very truly, C. G. Goodrich, Cashier.

See Annual Report to Stockholders, page 4.

In connection with this letter Plaintiff offered page 4 of the Report referred to in said letter, as follows:

4.

Condition of the Georgia Railroad and Banking Company.

Resources.

The Road and its Outfit.....		$4,200,000.00
134 Real Estate	6,591.08	
Banking House	24,000.00	
		30,591.08
Certificates of Indebtedness Atlanta and West Point Railroad Company	440,900.00	
4,409 Shares Atlanta and West Point Railroad Stock	440,900.00	
15,000 shares Western Railway of Alabama Stock, at $60.....	900,000.00	
Macon & Augusta Railroad Company	1,229,208.62	
Port Royal & Augusta Railway Bonds and Stock	200,000.00	
31 Walton Railroad Company Bonds $1,000 each	31,000.00	
150 Shares Georgia Railroad & Banking Company	30,000.00	
Bills Receivable	89,150.00	
		3,361,158.62
Cash		371,650.43

Expenditures.

Accrued Dividends on Stock.....	462,000.00	
Interest on Bonds.....	155,000.00	
Taxes, Incidentals, etc.....	23,106.98	
		640,106.98
		$8,603,507.11

Condition of the Banking Department.

Resources.

Overdrafts		15,673.30
Loans and Discounts		1,021,164.15
Due from Banks.....		410,333.63
U. S. Treasury and National Bank Notes .....$	132,164.00	
Gold Coin	2,947.50	
Silver and Fractional Coin.....	30,417.88	
Cheques and Other Cash Items.....	33,045.27	
		198,574.65
Safety Deposit Safe		3,600.00
		$1,649,345.73

Augusta, Ga. April 1st, 1889.

135 It was admitted that the State of Georgia is the owner of 186 Shares of the capital Stock of The Georgia Railroad and Banking Company, and that such of it appears in the Annual Reports of the Comptroller General from 1883 to 1904.

4. Affidavit of C. G. Goodrich as follows: "He is and has been continuously, the Cashier of The Georgia Railroad and Banking Company since October 11th, 1881. As such he has, and has had during that period the custody of the papers of said corporation, and has, and has had, full knowledge personally of its current business. That during the period of his cashiership, October 11th, 1881, to this time, a copy of the usual Annual Report of the Georgia Railroad and Banking Company has been mailed annually about the latter part of April or the first of May to the Treasurer of the State of Georgia, as representing one of the Stockholders, viz., The State of Georgia, which is, and has been during that period the owner of 186 shares of the capital stock of said corporation. Said Annual Report has uniformly borne as a part of one of its statements the following: "15,000 shares Western Railway of Alabama,—$900,000.00. Income belongs to Lessees." That said The Georgia Railroad does not vote the stock of the Western Railway of Alabama, which was issued to said former corporation on the incorporation of the latter, and has not voted said stock or any part of it at any time since it was originally issued; but said stock has been voted solely by the Lessees

of the Georgia Railroad—said Lessees holding during all that
136 period an irrevocable power of attorney from The Georgia Railroad and Banking Company to vote the same; and said last named company has, and has had in that period, no participation or voice, directly or indirectly in the control or management of said Western Railway of Alabama.

That while the dividends, when any are declared, on said stock, are paid over to The Georgia Railroad and Banking Company, it received them only for the purpose of paying them over to its Lessees, and that it has no ownership of, or interest in said dividends, which are solely and entirely the property of said Lessees.

That the relations just stated of the parties to these dividends do not result from any stipulation between the parties as to the stock, or made since the issue of the stock, but existed substantially before said issue, and spring from the substantial rights and interests of the Lessees under the Lease."

That said stock has no market value for the reasons stated in Paragraph 12 of the Petition for Injunction, in the above entitled cause—which paragraph Deponent has read—and also for the same reason said stock is worthless to The Georgia Railroad and Banking Company for sale or pledge except as to such value as it may have as representing and evidencing said Company's reversionary interest at the expiration of the Lease April 1, 1980."

5. Affidavit of Thos. K. Scott, as follows:

"He has read a copy of the affidavit of William A. Wright, made to be used in the above stated cause the — day of April, 1905.
137 "That it is true as stated in said affidavit that said Wright, as Comptroller General, did on or about May 25th, 1901, demand of this deponent the return for taxation of 15,000 shares of the stock of the Western Railway of Alabama; and that this Deponent replied to this demand that he knew of no law by which said stock was taxable, and requested said Wright to indicate the law, under which taxes were required.

That at that time and at all times previously, when he had anything to do in or about said stock, he was General Manager for the Lessees of certain property leased by The Georgia Railroad and Banking Company and then, as now, represented the said Lessees, and has never been the representative of The Georgia Railroad and Banking Company or in its service in any capacity whatsoever.

That said Comptroller General persisting in his purpose to tax said stock, this Deponent, acting for said Lessees and not for The Georgia Railroad and Banking Company—to-wit: For the Louisville and Nashville Railroad Company and for the Atlantic Coast Line Railroad Company, employed counsel to file, and they did file, a Bill for Injunction against the collection of said taxes in the Circuit Court of the United States for the Northern District of Georgia, and the cause commenced by said Bill is the same as that set forth in the Plea of *Res Adjudicata*, filed by Defendants in this present cause."

138 6. The affidavits of the following Tax Receivers for the Counties and for the years set opposite their respective names were next read, the affidavits of each of said Tax Receivers being identical:

		County.	Years Inclusive.
	John R. Dillon	Chatham	1885-1900
	J. B. Butler	Wilkinson	1899-1905
	Graham Thompson	Houston	1902-1905
	M. D. Oliff	Bulloch	1902-1905
	B. C. Reynolds	Haralson	1903-1905
	R. E. Richardson	Harris	1902-1905
	M. C. Griffith	Oconee	1888-1905
	D. T. Huggins	Walker	1901-1904
	J. S. Roberts	Early	1898-1904
	W. S. Foster	Clayton	1903-1904
	R. E. Dorsett	Chattooga	1905
	R. H. Ware	Coweta	1903-1904
	C. L. Moran	Baldwin	1902-1905
	Wm. Mauny	Calhoun	1903-1905
	John M. Weeks	Johnson	1903-1904
	T. G. B. Law	Laurens	1903-1904
	B. F. Bagley	Chattahoochee	1899-1905
	H. J. Hodge	Washington	1897-1904
	J. T. Vaughn	Pike	1903-1905
	J. A. F. Brown	Carroll	1901-1904
139	J. F. Lumford	Newton	1901-1905
	W. E. McCormick	Polk	1897-1905
	R. W. Blanton	Talbot	1901-1904
	J. H. Henderson	Muscogee	1905
	W. J. Moore	Upson	(1898-1905 except 1902)
	T. C. Tondee	Schley	1901-1905
	G. T. Southern	Jones	1903-1904
	J. J. Henderson	Jones	1901-1902-1905
	R. A. Templeton	Burke	1900-1905
	S. W. Gunnison	Dougherty	1897-1905
	W. H. Keller	Meriwether	1903-1905
	R. H. Banks	Monroe	1905
	J. S. Jinks	Taylor	1895-1905
	H. T. Johnson	Spalding	1899-1905
	L. C. Spence	Early	1905
	J. P. Raiford	Sumter	1897-1905
	W. H. Clopton	Newton	1870-1905
	J. T. Waller	Terrell	1899-1904

All of the affidavits of the above named Tax Receivers were as follows in form—the blanks in each being filled by name of Receiver, name of county and year, as appears in foregoing list; and being properly signed.

"Before me personally appeared —— —— who on being duly sworn deposes and says:

140 "1. He is Receiver of Tax Returns for the County of —— and has been such since the year —.

"2. Since deponent has been Receiver of Tax, Returns of said County the shares of holders of stock in railroads chartered by the State of Georgia have not been returned by said share holders for tax-

ation, nor has deponent required returns from such shareholders, and this has been the uniform practice ever since deponent has been Tax Receiver as aforesaid.

"3. The holders of shares of stock of manufacturing corporations chartered by the State of Georgia have not returned their stock for taxation during deponent's term of office, nor has deponent required any returns from the holders of such stock. This has been the uniform practice since deponent has held said office.

"4. The owners of shares of stock of foreign corporations who reside in the State of Georgia have not returned said stock for taxation since deponent has been in office, nor has deponent required any returns from such holders of such stock, and this has been the uniform practice of deponent since he has been in said office.

"5. It has been deponent's uniform practice to require returns of property from all domestic corporations which are subject to be taxed in said county, except such as under the law made their returns to the Comptroller General of the State of Georgia, and that the shareholders in all of said corporations which do make their returns to deponent have not made any returns to deponent for their stock
141 for taxation, nor have any other stockholders of any kind or character made any returns to this deponent for taxation, nor does deponent require returns therefor."

The affidavit of J. M. Crozier, Tax Receiver of Floyd County, for the years 1898-1904, both inclusive, was read in evidence and was identical with the above with the exception that at the end of the fifth paragraph these words were added "Except that Doctor James Ivey returned $2,000.39 of stock in the Anchor Duck Mills by mistake and the County Board of Commissioners of Floyd County, Ga., relieved him of that return."

The affidavit of E. Gary Summers, Tax Receiver of Coweta County since January 1st, 1905, was read in evidence and was identical with the above form of affidavit with the exception that the fourth paragraph thereof was omitted from his affidavit.

The affidavit of Z. H. Shelley, Tax Receiver of Randolph County for the years 1890-1895 was read in evidence and is identical with the above form of affidavit with the exception that deponent stated that he had been tax collector of said County since 1898 and that while he had been tax collector no one had paid to him taxes on either foreign or domestic shares of stock and that while he was tax collector he was familiar with the digest of tax returns, and that no one had during the years he was tax collector made any returns of either domestic or foreign stocks, and that the practice of the
142 tax receiver was not to require returns of either foreign or domestic stock.

The affidavit of John H. Dugger, Tax Receiver for Washington County since January 1st, 1905, was read in evidence and was indentical with the above form of affidavit with the exception that affiant stated that his books had not yet closed and that no one had "as yet" returned either foreign or domestic stock and "as yet" he had not required any returns from either the holders of foreign or domestic stocks.

The affidavit of W. E. Clarke, Tax Receiver of Jefferson County for the years 1890 to 1900 and 1902, 1904, was read in evidence and was identical with the above form of affidavit with the exception that the following words in the fourth paragraph are st-icken from this affidavit, to-wit: "Nor has deponent required any returns from such holders of such stock."

The affidavit of W. R. Pope, Tax, Receiver for Jasper County for the years 1900-1904 was read in evidence and was identical with the above form of affidavit with the exception that the following sentence is added after the fifth paragraph to-wit: "But while deponent was such receiver two persons did return debentures for taxation."

(7.) It was admitted that the Georgia Railroad and Banking Company and the Central of Georgia Railway Company were the only persons owning foreign Railroad Stocks proceeded
143 against for taxes on these kinds of shares. The Comptroller General's statement that he knew of no other delinquents was also admitted.

(8th.) The plaintiff read in evidence the following extract from the official report of Comptroller General Wright for the year 1903:

"The Constitution of 1877 requires all property real and personal in this state to be taxed ad valorem, except such property as is specifically exempt, and I have embraced a question in the tax list required by law to be submitted to all tax payers, calling for returns of *all* stocks and bonds, in which is included stock held by citizens of this State in non-resident corporations. Notwithstanding this, I believe I am correct in saying that little if any of such stock in this State are returned for taxation, the owners claiming that there is no statute providing specifically for their taxation and refusing to return them. I have a case now pending in the courts involving this question, in which I am claiming back taxes upon property of this kind, amounting to about $200,000. I refer to the suit of the Comptroller General *vs.* The Georgia Railroad and Banking Company to recover back taxes on 15,000 stock of the Western R. R. of Alabama held by the Georgia R. R. since 1881. The Central of Georgia Railway also is an owner of an equal amount of said stock, which we hope to subject to back taxes for the same time."

144 Plaintiff also read in evidence extract from the official report of said Comptroller General for the year 1903 as follows:

"Stocks in foreign corporations held by citizens or corporations of this State should be required to be returned for taxation in this State, it being claimed by the owners of such that there is no statute of Georgia which specifically requires their return for taxation. This item of property if taxed would add several millions of dollars to the taxable property of the State."

(9.) Annual return for taxation of the Georgia Railroad and Banking Company of all property owned by said Company on the first of March, 1895, made to the Comptroller General by the President in pursuance of law, without deducting the indebtedness of said Company:

The road and its outfit			4,200,000
Less amount exempt, except as to tax on net earnings			4,156,000
Balance of road and outfit			44,000
Ctf. of Indbt. Atl. & W. P. R. R. Co. $440,900 at 90			396,810
Genl. Mtg. Bonds P. R. & A. Ry. Co. $300,000 at 50			150,000
1st. " Union P. & W. P. R. R. Co. $84,000 at 50			42,000
1st. " Walton R. R. Co. $31,000 at 50			15,500
2nd. " Gains. Jeff. & S. R. R. Co. $22,000 at 50			11,000
Real Estate in Green County at Union Point			2,100
	Clarke	Athens	4,900
	Morgan	Rutledge	400
	De Kalb	Lithonia	3,250
	Fulton	Atlanta	415,000
145 Total taxable property			711,460

Sworn to April 27th, 1895, by Charles H. Phinizy, President of Georgia Railroad & Banking Company.

Tax returns substantially the same as the above were made for the years 1896 to 1904 both inclusive—On none of these returns are stocks owned by the Georgia Railroad and Banking Company, domestic or foreign, returned, except as stated in the supplemental returns made under protest in 1903 and 1904 as averred in the amendment to the petition in this cause and admitted by the answer thereto.

(10.) Assessment of the Western Railway of Albama on 15,000 shares of Albama stock for 1895 as follows: "Whereas the Georgia Railroad & Banking Company, a corporation chartered under the laws of Georgia and doing business in this State having failed and refused to return for taxation for the year 1895, 15,000 shares of stock of the Western Railway of Alabama, an Alabama corporation, said stock being then held and owned by said Georgia Railroad and Banking Company in this State; and having failed and refused to pay the taxes due the State thereon for the year 1895 as required by law, I hereby assess the said 15,000 shares of stock of the Western Railway of Alabama for said years as being then of the value of $900,000. Said assessment being made by virtue of authority vested in me by law as Comptroller General "from the best information I can procure."

Given under my hand and seal of office, This February
146 7, 1905.

WILLIAM A. WRIGHT,
Comptroller General of Georgia.

(11.) Similar assessments for each year from 1896 to 1904 were made, all bearing date February 7th, 1905, and all being in form similar to that above, varying only as to the assessments of value, as follows, to-wit:

Year.	Amount of Assessment.
1895	900,000.00
1896	1,050,000.00
1897	1,400,000.00
1898	1,100,000.00
1899	1,450,000.00
1900	1,450,000.00
1901	1,600,000.00
1902	1,950,000.00
1903	2,200,000.00
1904	2,200,000.00

(12.) It was admitted by the defendant that the Comptroller General "had a book upon which these assessments are usually entered. The first execution that was issued has been recorded and a place left for the entry of all the balance; but it being a very busy time in the Comptroller's office the bookkeeper has not had time to enter them all. The original assessments had not been entered on any book, but would be as soon as possible."

(13.) To all and singular, The Sheriffs and other Lawful Officers of the State:

You are hereby commanded, that of all goods and chattels, lands, tenements and franchises of The Georgia Railroad and Bank-
147 ing Company, a corporation doing business in this State and chartered under the laws of this State and lying wholly within this State, you cause to be made the sum of Four Thousand One hundred and Four ($4104) Dollars as its tax for the year 1895, due the State of Georgia, and interest at seven per cent, per annum from December 20th, 1895, under and by virtue of the laws of the State of Georgia, providing for the taxation of Railroads in this State, for State purposes in pursuance of an assessment on file in this office as follows:

Whereas, The Georgia Railroad and Banking Company, a corporation chartered under the laws of Georgia and doing business in this State, having failed to return for taxation for the year 1895, 15,000 shares of stock of the Western Railway of Alabama, an Alabama corporation, said stock being then held and owned by said The Georgia Railroad and Banking Company in this State; and having failed and refused to pay the taxes then due the State thereon for the year 1895 as required by law, I hereby assess the said 15,000 shares of stock of The Western Railway of Alabama for said year as being then of the value of $900,000.00. Said assessment being made by virtue of authority vested in me as Comptroller General from the "best information I can procure," and all lawful costs, and that you pay over said sum of money to the Comptroller General of said State, at his office in Atlanta, Georgia, and return thereto
148 This execution, with your actings and doing entered thereon.

Witness, William A. Wright, Comptroller General of said State under his official hand and the seal of said office.

Issued this, the 17th day of February, 1905.

WILLIAM A. WRIGHT,
Comptroller General of Georgia."

(14.) Tax executions for 1895 to 1904 inclusive, all dated February 17, 1905, and in form identical with that for 1883 except as to the amount, which amounts are as follows:

1895	4,104.00
1896	4,788.00
1897	7,294.00
1898	6,831.00
1899	7,772.00
1900	7,540.00
1901	8,704.00
1902	10,335.00
1903	11,000.00
1904	10,560.00

(15.) Endorsed upon each of said executions is a levy as follows:

Form of Sheriff's Levy on Each of the Tax *fi. fas.*

149 STATE OF GEORGIA, *Fulton County:*

I have this day levied the within *Fi. Fa.* on the following real estate, to-wit:

Part of land, lot No. 77 in the 14th district of Fulton County, Georgia, in Ward 2, of the city of Atlanta, Georgia, commencing on the northeast corner of Central avenue (formerly Lloyd Street) and Waverly Place, and running thence in an easterly direction along the North side of Waverly Place and beyond the ending of Waverly Place, a sufficient distance to make 544 feet more or less, thence northerly 265 feet more or less, thence westerly 544 feet more or less, to Central avenue, thence southerly along the East side of Central avenue 225 feet more or less to the point of beginning, known as the Georgia Railroad and Banking Company's warehouse, together with the buildings thereon, containing three acres more or less.

Levied on as the property of The Georgia Railorad and Banking Company to satisfy a tax *Fi. Fa.* issued by Wm. A. Wright, Comptroller General of the State of Georgia *vs.* said The Georgia Railroad and Banking Company.

This February —, 1905.

(16.) Form of Notice of Levy given in each case on execution for each year.

150 GEORGIA, *Fulton County:*

To the Georgia Railroad and Banking Company or Tenant.—Please take notice that I have this day levied a *Fi. Fa.* issued from the Comptroller General of the State of Georgia, this County, upon the property described below, and will proceed to advertise and sell the same, as prescribed by law, before the Court House door in the city of Atlanta, on th[illegible]t Tuesday in April, 1905, within the legal hours of sale.

This February 23, 1905.

JNO. W. NELMS, *Sheriff.*

(17.) Extract from docket from Comptroller General's office showing the rate of taxation in Richmond County for State and School purposes from 1889 to 1904, inclusive, was as follows:

Year.		Rate.
1889	County	8.9
	School Rate	2.3
1891	County	4.97
	School	2.2
1892	County	4.3
	School	2.1
1893	County	4.3
	School	2.1
1894	County	4.3
	School	2.1
1895	County	4.3
	School	2.
1896	County	6.40
	School	2.3
1897	County	4.6
	School	2.2

1898	County	4.4
	School	2.2
1899	County	4.7
	School	2.2
1900	County	4.60
	School	2.60
1901, 1902, 1903, 1904	County	4.60
	School	2.65

(18.) In the City of Augusta the rate of taxation for the years 1895 to 1904 both inclusive has been $1.25 per $100.00.

(19.) (Consolidated)

Table

Showing Assessments Made by the Comptroller General on the 15,000 shares of Stock of the Western Railway of Alabama for Taxation, together with State Tax Rates and amount of State Tax for the years 1895 to 1904, inclusive:

1895	900,000	4.56	mills	4,104.00
1896	1,050,000	4.56	"	4,788.00
1897	1,400,000	5.21	"	7,294.00
1898	1,100,000	6.21	"	6,831.00
1899	1,450,000	5.36	"	7,772.00
1900	1,450,000	5.20	"	7,540.00
1901	1,600,000	5.44	"	8,701.00

1902	1,950,000	5.30	"	10,335.00
1903	2,200,000	5.	"	11,000.00
1904	2,200,000	4.80	"	10,560.00
				78,928

152 20. Statement showing dividends received by The Georgia Railroad from the Western Railway of Alabama from the beginning of the Lease of the Georgia Railroad April 1st, 1881, to the close of the last fiscal year ended June 30th, 1904.

Fiscal Year Ending—		Amounts.
March 31st,	1882	$44,019.53
"	1883	85,126.67
"	1884	28,120.00
"	1885	37,500.00
"	1886	22,500.00
"	1887	None
"	1888	None
June 30th,	1889 (15 months)	None
"	1890	None
"	1891	None
"	1892	None
"	1893	30,000.00
"	1894	30,000.00
"	1895	30,000.00
"	1896	30,000.00
"	1897	45,000.00
"	1898	45,000.00
"	1899	30,000.00
"	1900	30,000.00
"	1901	60,000.00
"	1902	60,000.00
"	1903	60,000.00
"	1904	60,000.00
Total		$727,266.20
Average per year for 23¼ years, that is 2.09 per cent. on $1,500,000.00		$31,280.27

153 (21.) Testimony of Charles G. Goodrich, by Affidavit dated Jan. 29, 1906. That from 1881 to 1895, he was the Cashier of The Georgia Railroad and Banking Company, during which period said Bank conducted one of the largest banking businesses in the State of Georgia. That in 1892 the business of the Banking department of the Georgia Railroad and Banking Co. was discontinued, and Deponent became the Cashier of the Georgia Railroad Bank at Augusta, Ga., which position he has occupied up to the present time, besides occupying the position of Cashier of the Georgia Railroad and Banking Company.

That during said period the extent of the business of the Georgia Railroad and Banking Co., and of the Georgia Railroad Bank, the number and variety of their transactions, through him, in which the value of Bonds, Stocks, commercial securities of different kind were involved. Deponent became familiar with the value of stocks and other securities, and the elements which influence the fluctuations in the price of such securities in the State of Georgia, and the market value of all such stocks;

That, in arriving at the market value of any stock, the main elements are the prosperity or want of prosperity of the Country and the amount of dividends declared; that while Net Earnings may, in some measure, affect the value of a stock, this does not immediately or sensibly increase the market price until the Surplus reaches a sum which is as much as 15% or 20% of the Capital stock. This is due to the fact that sound business principles would prevent the
154 declaration of all earnings as dividends, in view of the necessity of maintaining a reserve for business contingencies and especially for replacements, made necessary by the inevitable deterioration of the plant.

That, even if a stock paid dividends, and the past history of the Company's business and earnings showed that it had failed to declare dividends with regularity, such past record, and such failure, would be calculated to depress the market value of said stock until the Company had demonstrated that it would be reasonably certain to continue the payments of dividends in the future; that the market value of stock is also largely affected by the past history of the Company, and a consideration of whether, during the past, it has regularly and constantly paid dividends, and the amount of such dividends.

Deponent further says that during the years 1895 to 1904, the stock of the Western of Alabama Railway stood in the name of the Georgia Railroad and Banking Co., and of the Central of Georgia Railway Co. and was not bought or sold as other stocks, yet the fair value of said stock during each of said years can be determined by consideration of its then present and past earnings and dividends, and by a comparison with the value of other stocks during the same period;

That from the year 1890 until 1896 there was great depreciation in the value of all securities and stocks, particularly so in the
155 value of Railroad stocks; that during said period, many of the Railroads in Georgia and in the South were in the hands of Receivers, and stocks of companies which then earned and paid dividends were far below the present value of the same stocks earnings and paying now the same dividends; that this depreciation in the value of stocks and especially in the value of Railroad stocks, continued until about 1896, when there began a gradual increase in market values. Deponent attaches hereto (Exhibit "A") a statement showing the values during said years of the stocks of the Georgia Railroad and Banking Company, the Atlanta & West Point Railroad, the Augusta & Savannah Railroad, and the Southwestern Railroad, which are now and were then, among the most valuable Rail-

road stocks in the State of Georgia; that these stocks are largely sought and held for investment by residents of the State—there being almost daily sales of the same during said years; that the value of the same furnishes a fair standard by which to estimate the value of other stocks, especially of Railroad stocks during said years.

Deponent further says that the market value of stock is little influenced by Net Earnings unless such Net Earnings are paid out as dividends, because the holder of the stock derives no benefit of such Net earnings; that an exception to this is where a Company, for a long period, earns and declares dividends, and in addition, accumulates a large Surplus, which can be used as Working Capital, or when
156 it attains a large per cent. on the Capital, may be paid out as "extra" dividends. That the Atlanta & West Point Railroad is an instance in point. It not only declared a 6% dividend with unfailing regularity, but earned so large a sum in excess thereof, that it accumulated a great Surplus, which was ultimately declared as an "extra" dividend of 25%. That said railroad is now paying 6% on Debentures, 6% on Common Stock, and, in addition, earning annually a large sum in excess of all Fixed Charges and Dividends, which Surplus, it is reasonably to be supposed, will, in time, be divided among the stockholders; that, for this reason, said Railroad stock, paying regular 6% dividends, which is the most valuable of the non-guaranteed Railroad stocks in Georgia, is now selling at 160, and sold from 1895 to 1904 at the prices set out in Exhibit A; that, in Deponent's opinion, during all the period from 1895 to 1904, the Atlanta & West Point stock was fairly and reasonably worth from two to three times as much as the Western of Alabama Railway stock;

That the next most valuable guaranted, non-taxable Railroad stocks with which Deponent is familiar, are the Augusta & Savannah Railroad and the Southwestern Railroad, which are guaranteed 5% stocks and by virtue of that guaranty, contained in Lease to the Central of Georgia Railway Co., in 1895, sell above par, and during the years 1895 to 1904, with slight variations, sold at prices ranging from 41 to 120, according to statement hereto attached;
157 That the stock of the Georgia Railroad and Banking Company which has been leased for 99 years at a rental which guarantees 11% on the stock, has sold from 1895 to 1904, at prices ranging from 150 to 260;

That each of said stocks, during each of said years were worth far more than the stock of the Western of Alabama Railway;

That deponent attaches hereto a statement of the dividends earned by the Western of Alabama Railway Company during a period of twenty three years, and says that, in his opinion the fair value of said stock was as follows for each of the years from 1895 to 1904 inclusive.

1895	$25	per	share
1896	25	"	"
1897	40	"	"
1898	45	"	"
1899	25	"	"

1900	25	per share
1901	60	" "
1902	70	" "
1903	80	" "
1904	90	" "

Deponent further says that these estimates are on the basis that the stock was not taxable; but, that, if the said stock is taxable, and the stockholder is obliged to pay taxes when no dividends are declared, or to deduct from the dividends the amount of taxes, that the market value of the stock would be greatly depreciated;

158 Deponent further says that the value of the Western of Alabama Railway stock to the Georgia Railroad is merely nominal, in view of the fact that, by reason of the Lease, said Georgia Railroad and Banking Company is not entitled to collect the dividends or to vote the stock, or to exercise any of the rights of ownership, and has no beneficial interest in said stock except the reversion after the expiration of the 99 years' Lease, and that his estimate of the value of the Western of Alabama Railway stock for the years 1895-1904 is on the theory that said stock was held by an owner entitled to vote the same, to collect the dividends, and to transfer it.

Deponent further says that one of the elements making the Western of Alabama Railway stock as valuable as it is grows out of the fact that it is controlled by the Atlantic Coast Line, the Louisville and Nashville Railway, and the Central of Georgia Railway Company, from whom it receives business that would otherwise be diverted to other lines;

Deponent has not actually verified the market quotations set out in Exhibit A, but believes that it fairly represents the general value of the stock during said years.

(Exhibit A, referred to in the foregoing is the same as that marked A and attached to the affidavit of Wm. E. Bush and the list of dividends of the Western of Alabama Railway is the same as appears elsewhere in the Record.)

(22.) W. E. Bush, testified by affidavit.

159 That he is now and for the past fourteen years has been engaged in the Stock and Bond brokerage business in Augusta, Ga., and is familiar with the quotations and market values of stocks and bonds dealt with in said City and State, especially so with the quotations and market prices during said years of stock of the Augusta & Savannah Railroad, the Southwestern Railroad, the Atlanta & West Point Railroad, and the Georgia Railroad and Banking Co., which are among the most active stocks in the State of Georgia, and dealt in more largely, probably, than any other Railroad stock in the State,—said stocks being particularly sought after by those desiring holdings as an investment, and said stocks being largely owned by residents of the State of Georgia;

That prior to 1896, the stock of the Augusta & Savannah Railroad and of the Southwestern Railroad paid 7% dividends under and by virtue of contracts of rental of said Roads by the Central Railroad and Banking Co.; that from 1896 to 1904, said stocks paid 5%

guaranteed dividends by virtue of rentals of the properties thereof to the Central of Georgia Railway Co., and that the Atlanta & West Point Railroad during all of said years invariably paid 6% dividends annually, besides adding to its surplus account, which surplus, at one time attained to a sum large enough to warrant the Company declaring a cash dividend of 25%.

That the Georgia Railroad and Banking Co., since 1883 has paid dividends of 11% by virtue of a lease for 99 years at an an-
160 nual rental of $600,000; that said stocks are the most valuable stocks which are generally held and dealt in by persons all over the State, and the prices paid therefor are standards by which fairly to measure other stocks in the State.

That about the year 1893, many of the Railroads in Georgia were in the hands of Receivers, all stocks being greatly depressed in their market value, and selling at prices greatly less than said stocks are selling during 1905 and 1906, even though they then paid the same dividends and were supported by the same rental contracts and guarantees as exist at the present time; that this depression continued until about 1896, when there began a steady but gradual advance; that the depression and advance characteristic of these stocks were coincident with the depression and advance of other securities and Railroad stocks in Georgia, and Deponent attaches hereto a tabulated statement marked Exhibit A showing the market quotations of each of said stocks for the years 1893 to 1904; that said figures fairly represent the value during the months of May during each of said years.

Deponent further says that while Net Earnings are a factor to be considered in determining the value of stocks, the principal element is dividends declared, and the business expectation that dividends will or will not be permanently paid in future; that generally speaking the Surplus does not begin sensibly to affect the value of stock until such surplus has reached something like 20% of
161 the Capital; that this is due to the fact that even after Betterments have been paid, sound business principles require a reserve for Depreciation, and Deponent knows of no railroad or other stock in Georgia, the market value of which could be determined by a mere inspection of the Annual Balance Sheet, showing Assets and Liabilities, Gross Earnings, Operating Expenses, Interest, Charges, Amounts paid out for Betterments and dividends; and that physical condition is, an element also to be considered.

That in the light of conditions as they existed in each of the years 1895-1904 and comparing the Western of Alab-ma Railway stock which is a non-guaranteed stock, with the Augusta & Savannah Railroad, the Southwestern Railroad, and the Georgia Railroad and Banking Co., which are guaranteed stock, and the Atlanta & West Point Railroad, which, while not a guaranteed stock, was a constant dividend paying stock, and considering the market values of stocks of all sorts obtaining during said years, Deponent says that, in his opinion, the market value of the Western of Alabama Railway stock for each of the years would not exceed the amounts following:

1895	40
1896	40
1897	45
1898	50
1899	70
1900	60
1901	70
1902	80
1903	90
1904	95

162 Deponent further says that a very large element of the value of said Western of Alabama Railway stock grows out of the fact that the stock is held by the Central of Georgia Railway, by the Georgia Railroad and Banking Co., and through it controlled by the Atlantic Coast Line and by the Louisville & Nashville Railroad, in consequence of which the volume of business and the earnings of the Western of Alabama Railway are increased beyond what they would otherwise have been; that the fact that said Railroad is used for through business by said systems and their connecting systems, requires that a larger proportion of earnings should be applied and used by it by way of betterments, and the improvements and maintenance of a high physical condition better equipment, better road bed and heavier rails, then if said road were used for local business only;

163 (EXHIBIT "A" TO AFFIDAVITS OF BUSH AND GOODRICH.)

Atlanta & West Point Railroad.

Years.	Bid.	Asked.
1893	80	90
1894	85	90
1895	98	100
1896	105	
1897	102	
1898	112	
1899	125	130
1900	125	128
1901	135	
1902	150	Sales
1903	160	"
1904	161	"

Augusta & Savannah Railroad.

1893	77	85
1894	80	
1895	82	
1896	96	
1897	94	
1898	103	

1899	111	113
1900	110	113
1901	115	115½
1902	120	Sales
1903	117½	"
1904	114½	"

Southwestern Railroad.

1893	41	45
1894	70	72
1895	71	73
1896	95	96
1897	93	95
1898	103	
1899	112	113
1900	110	113
1901	117	Sales
1902	120	"
1903	121	"
1904	114	"

Georgia Railroad & Banking Company.

1893	150	155
1894	156	160
1895	167	170
1896		177½
1897	172½	
1898	196	
1899	207	210
1900	220	225
1901	233	
1902	237	Sales
1903	260	"
1904	260	"

164 23. GEO. H. RICHTER for Plaintiff testified:

I am assistant Secretary of Central of Georgia Railway Co. and have been in this capacity and in others continuously engaged in railroad work since 1891. During this period I have had considerable experience in the compilation of figures in railroad matters, and the examination of reports or railroad commissions, of railway companies, and similar reports.

I have personally compiled the ten tables for the years 1895 to 1904, inclusive, marked Exhibit A, which are attached hereto, and said tables with the memoranda preceding the same, are correct. The figures used therein are taken as therein indicated, from the official annual reports of the Comptroller General of the State of Georgia, the official annual reports of the Railroad Commission of Georgia, and the official annual reports of the Western Railway

Company of Alabama. In addition to the explanations attached to the said tables, the following explanations are given.

The Atlanta & West Point Railroad Company, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, Southern Railway Company, and Wrightsville and Tennille Railroad Company have been used for each of the years, although the mileage of some of these roads has changed from time to time. The Plant System is used for the years 1895 to 1902, inclusive. Thereafter, the Atlantic Coast Line, into which the Plant System
165 was consolidated, is used in its place. The Seaboard Air Line, designated as S. A. L., appears for the first time in 1901 as a combination of the Florida, Central and Peninsular, Georgia & Alabama , and Georgia Carolina and Northern, which form constituent parts of the Seaboard Air Line Railway. The Georgia, Florida & Alabama, referred to as G. F. & A., appears for the first time in 1902, prior to which time it either did not exist, or was too small to be of consequence. The Atlantic & Birmingham, referred to as A. & B., for the same reason appears for the first time in 1903.

These railroads have been selected because they were either the largest railroads in the State, having the largest earnings, or was representative railroads. The last figure in the table is not the sum of the figures used for these selected railroads, but is the total for all railroads in the State, as well those appearing in the table, as those not so appearing.

Foot notes to the tables show certain deductions which have been made. These are of two characters only. The first class of deductions is for property covered in the returns of Central of Georgia Railway Company which was not part of the taxable railroad property of that company, but consisted largely of rolling stock and other property appurtenant to its 261.77 miles of non-taxable mileage; such rolling stock and other property, however, being nevertheless taxable. The second class of deductions has been on account of the earnings of properties included in reports of earnings, but not
166 included in assessments for taxation on account of charter exemptions, or (in the case of the Western & Atlantic Railroad) ownership by the State. The actual reported net earnings of the Western & Atlantic Railroad were deducted. In the case of exempt lines of Central of Georgia Railway Company and Georgia Railroad and Banking Company, that proportion of total net earnings which their exempt lines bore to the total lines was deducted. No correct comparisons could possibly be made without making these deductions.

In each table the Western of Alabama Railway has been treated exactly the same as the Georgia Railroads.

The tables are based on the extract from the affidavit of Wm. A. Wright, Comptroller General, made in this case, and appearing in the bill of exceptions signed in this case July 4, 1905, on page- 147-8 of the printed copy thereof, wherein he states "I ascertained the amount of gross earnings of the Western Railway of Alabama for each year in which the said shares of stock of the Western Railway were in default for taxes. I also ascertained the operating expenses of said road for the same period and deducted the operating expenses

from the gross income, except when the operating expenses appeared to include betterments; I then deducted 66⅔ per cent. of the income as operating expenses; and from that sum deducted the annual interest, charged on the said Western Railway of Alabama, and capitalized the balance at six per cent., thus reaching what I deemed the market value of the shares of stock of the said Western Rail-
167 way of Alabama, and made my assessment for each year upon this basis of value thus arrived at."

In making comparisons, there being no assessment upon the stock of railroads in Georgia, but upon their properties, it was necessary to change his method only by eliminating his deduction of the indebtedness of the Western of Alabama. In stating his assessment of the Western of Alabama stock in column five of the tables, his assessment of the one-half thereof belonging to each railroad has doubled, and to it has been added $1,543,000, which is the amount of the indebtedness of this railroad. In other words, column five, assuming the bonds to be worth par, shows the total assessment of the capitalization, and therefore of the property, of the Western Railway; for example, in 1895, he assessed

To Georgia Railroad, 15,000 shares.....	$900,000.00
To Central of Ga. Ry., 15,000 shares.....	900,000.00
Add indebtedness	1,543,000.00
Total in column 5.....	3,343,000.00

It will be observed that notwithstanding his statement as to method, his actual assessment in every year except the year 1898 has been greater than the result arrived at by using his method. In 1899 it was 24.31 per cent. more. For ten years, the average percentage which his actual assessment bears to his theoretical valuation is 109.98, which means that he has added nearly ten per cent. to the gross over valuation which resulted from his alleged method.

168 Taking the figures for all the railroad mileage in the State, it will be observed that the maximum percentage of actual assessment to theoretical valuation was in 1903, when it was only 54.79, less than one half of the maximum in the Western of Alabama case, 124.31, in 1899. The average percentage of actual assessment to theoretical valuation for all these railways for the ten years is 49.63. In other words, applying his method of assessment, he has assessed the Western Railway of Alabama at ten per cent. in excess of the results ascertained, and has assessed all the railroads in Georgia at less than one-half of the results ascertained.

Comparing the Western of Alabama Railway with Atlanta & West Point Railroad, which is assessed by the Comptroller General at a greater value per mile than any other railroad in the State of Georgia, and which has a greater value per mile than Western Railway of Alabama, while the average assessment on the theoretical basis used by the Comptroller General on Western Railway of Alabama is 109.98 per cent. of the ascertained results, the average on the Atlanta & West Point is only 43.39; in other words, the Western of Alabama,

although of less value, is assessed at more than two and one half times as much as the Atlanta & West Point.

Deponent attaches hereto as Exhibit B a statement of the "Operating Ratio of the four subdivisions of Expenses" of all railroads in United States reporting to Interstate Commerce Commission, of Group V of said railroads, and of the Central of Georgia Railway Company, for the years 1897 to 1904, both inclusive. Said
169 statement has been compiled by him, so far as it concerns the railroads in the United States and in Group V, from the official annual reports of the Interstate Commerce Commission, and so far as it concerns the Central of Georgia Railway Company, from the official annual reports of that company. Said compilation is correct.

Sworn to and subscribed before me, this Jan. 27th, 1906.

(EXHIBIT "A.")

To —— of George H. Richter.

Tables showing actual assessment of Railroad properties in Georgia for taxation 1895 to 1904, inclusive, as compared with capitalization of Net earnings on basis used by Comptroller General in assessment of Western Railway of Alabama, stock.

Assessments are taken from official annual reports of the Comptroller General, and earnings of railways in Georgia from official annual reports of the Railroad Commission of Georgia; earnings of Western of Alabama Railway from its annual reports.

Column 1 shows *actual percentage of operating expenses* to earnings as per reports.

Column 2 shows the *percentage used* in the tables in ascertaining net earnings, being as per Comptroller General's method a maximum of 66.66%; much less than the actual percentage.

170 Column 3 shows the *net earnings* of each railroad on the basis of the operating ratio of column 2; much greater than the actual net earnings.

Column 4 shows the *theoretical value* of the railway properties ascertained by capitalizing the net earnings in column 3 on a 6% basis, much more than actual value.

Column 5 shows the *actual assessment* for taxation by the State of Georgia.

Column 6 shows the percentage which the actual assessment (Column 5) bears to the theoretical valuation (column 4) used on Western Railway stock.

In each table a few of the prominent railroads in Georgia have been selected and treated in detail. The same roads are used in each table, except where changes or omissions were necessary on account of new railroads, and changes in systems.

The last line in each column covers the entire railroad mileage of the State.

In the case of Central of Georgia Railway Company assessments do not cover 261.77 miles (469.77 miles in 1895) operated by it,

which are exempt from taxation. Proportionate earnings of this exempt mileage have been deducted from earnings as shown in Railroad Commission reports for the entire system. Likewise in the totals for all railroads in the State the assessments do not cover these exempt miles of

171	Central Railway	261.77
	Exempt miles of Ga. Railroad	229.
Exempt lines of Western & Atlantic		138.
	Total exempt mileage	628.77

In column 3 the earnings of these exempt properties have been eliminated from the total as shown in Railroad Commission's reports.

172 (1904.)

1	2		3	4	5	6
Railroad.	Operating ratio. Act.	Est.	Net earnings.	Net earnings capitalized at 6%.	State assessment.	% of ass't to capitalized value.
W. of Ala.	60.95	60.95	$364,716	$6,078,607	$5,943,000	97.76
A. & W. P.	60.18	60.18	321,897	5,364,932	1,898,346	35.38
At. & Bir.	59.21	59.21	106,172	1,769,548	1,398,592	79.03
A. C. L.	62.63	62.63	1,829,973	30,499,566	10,590,608	34.72
C. of Ga.	73.07	66.66	2,315,387	38,589,789	11,749,059*	38.19
G. F. & A.	72.70	66.66	39,585	659,754	470,783	71.35
G. S. & F.	68.41	66.66	459,977	7,666,299	3,904,313	50.92
S. A. L.	69.52	66.66	987,719	16,461,997	8,986,409	54.58
So.	76.40	66.66	1,911,328	31,855,471	12,660,357	39.74
W. & T.	64.76	64.76	59,713	995,231	527,169	52.96
All railroads in State.	70.83	66.66	8,495,299†	141,554,986	62,846,754*	44,39

* There has been deducted $489,900 on account of rolling stock on non-taxable lines.

† There have been deducted from net earnings of all railroads in State, viz. 10,247,338 50

the following net earnings of non-taxable lines

Central of Georgia	$374,165.02	
Western & Atlantic	850,365.10	
Georgia	529,509.19	
		1,754,039.31
leaving net earnings as stated		$8,493,299.19

173 (1903.)

1	2		3	4	5	6
Railroad.	Operating ratio. Act.	Est.	Net earnings.	Net earnings capitalized at 6%.	State assessment.	% of ass't to capitalized value.
W. of Ala.....	60.5	60.5	$328,602 00	$5 476 715	$5 943 000	108.51
A. & W. P....	61.07	61.07	297 303 75	4 955 062	1 904 970	38.44
A. & B.....	56.65	56.65	65 404 70	1 090 078	832 000	76.32
A. C. L. ...	68.93	66.66	979 627 72	11 327 128	10 640 492	65.17
C. of Ga.....	70.69	66.66	1 576 300 60	26 271 666	14 914 678*	56.77
G. F. & A...	72.94	66.66	25 436 51	423 941	456 946	107.7
G. S. & F.....	68.23	66.66	369 879 71	6 164 661	3 950 958	64.09
S. A. L	71.70	66.66	893 661 79	14 894 363	8 508 543	57.12
So.....	73.96	66.66	1 645 031 84	27 417 197	11 993 829	43.49
W. & T.....	66.11	66.11	48 619 82	810 330	562 563	69.42
All Railroads in State.....	70.68	66.66	6 729 458 07	112,057 635	61 402 081*	54.79

*There has been deducted from total assessment $501,905. on account rolling stock and property on non-taxable lines, and scrap iron.

†There have been deducted from net earnings of all railroads in state, viz..... $8,317,589.62

the following net earnings of non-taxable lines.

Central of Georgia.....	$346,928.54	
W. & Atlantic	741,066.53	
Georgia	500,136.48	
		1,588 131 55
Leaving net earnings as stated		$6 729 458 07

174 1902.

1	2		3	4	5	6
Railroad.	Operating ratio. Act.	Est.	Net earnings.	Net earnings capitalized at 6%.	State assessment.	% of assessment to capitalized value.
W. of Ala	64.8	64.8	$290 202	$4 836 714	$5 443 000	112.53
A. & W. P.....	65.57	65.57	255 009	4 250 152	1 715 802	40.37
C. of Ga	67.60	66.66	1 564 296	26 071 815	11 762 039*	45.11
G. F. & A.....	58.78	58.78	28 223	470 389	242 855	51.62
G. S. & F.	67.06	67.06	355 023	5 917 053	2 305 860	38.96
Flt. Sys.... ...	69.04	66.66	951 552	15 859 213	7 968 622	50.24
S. A. L	81.19	66.66	696 172	11 602 867	7 644 696	65.88
So	70.15	66.66	1 631 065	27 184 426	11 118 725	40.87
W. & T.....	61.23	61.23	61 968	1 032 807	453 631	43.92
All Railroads in State.....	70.48	66.66	6 319 695*	105 328 257	54 150 954*	51.43

*There has been deducted $1,061,619 on account of rolling stock on non-taxable lines, and property not used for railroad purposes.

†There has been deducted from net earnings of all railroads in State, viz..... $7,748,741.84

the following net earnings of non-taxable Lines

Central of Ga	$335 736 20	
Georgia.....	427 583 27	
Western & Atlantic.....	665 726 95	
		1 429 046 42
Leaving net earnings as stated.....		$6 319 695 42

175 1901.

W. & A.	64.5	64.5	$262 426 14	$4 373 768	$4 743 000	108.44
A. & W. P.	61.89	61.89	267 704 79	4 461 746	1 655 123	37.09
C. of Ga.	63.48	63.48	1 281 147 59	21 385 246	9 250 769	43.12
G. S. & F.	64 54	64.54	362 580 05	6 043 000	2 030 973	33.76
Plt. Sys	71.87	66.66	877 859 70	14 630 995	7 681 951	52.54
*S. A. L	75.55	66.66	992 310 00	16 538 500	5 906 931	35.71
So.	72.37	66.66	1 480 019 16	24 666 986	10 819 657	43.86
W. & T.	62.70	66.66	55 005 06	926 751	441 007	47.62
All Railroads in State	69.43	66.66	5 969 829 33†	99 497 156	46 044 870	46.28

*Includes F. C. & P., G. & A. G. C. & N.

–There has been first deducted $894.929 on account of rolling stock on non-taxable lines and property not used for railroad purposes.

† There have been deducted from net earnings of all railroads in State, viz. $7,403,950.00

the following net earnings of non-taxable lines

Central of Georgia	$411 516 49	
W. & Atlantic	603 034 17	
Georgia	419 570 03	
		1,434,120 69
leaving net earnings as stated		$5,969,829.33

176 (1900.)

1. Railroad.	2. Operating ratio. Act.	Est.	3. Net earnings.	4 Net earnings capitalized at 6%.	5. State assessment.	6 % of ass't to capitalized value.
W. of A.	60.9	60.9	$261 686 17	$4 361 436	$4 443 000	101.87
A. & W. P.	60.75	60.75	238 127 95	3 968 799	1 585 953	39.9
C. of Ga.	61.78	61.78	1 295 228 53	21 587 142	8 461 109*	39.1
G. S. & F	72.94	66.66	317 932 65	5 298 878	1 894 403	35.7
Plt. Sys.	76.	66.66	871,756 96	14 529 283	7 721 352	53.1
So.	74.65	66.66	1 358 848 92	22 647 482	10 725 178	47.3
W. & T.	65.28	65.28	39 665 51	661 092	403 872	61.
All railroads in State	70.14	66.66	5,632 084 00†	93 868 066	43 127 792	45.94

*There has been deducted $823,568. on account of rolling stock on non-taxable lines and property not used for railroad purposes.

† There have been deducted from net earnings of all railroads in State, viz. $7,029,103.45

the following net earnings of non-taxable lines:

Central of Georgia	$422,318.03	
Western & Atl.	582,732.33	
Georgia	391,969.09	
		1 397 019.45
leaving net earnings as stated		$5 632 084 00

177 1899.

W. of A	64.5	64.5	$214,444.61	$3,574,076	$1,443,000.	124.31
A. & W. P.	60.45	60.45	227,496.39	3,791,606	1,636 732	43.16
C. of Ga.	62.35	62.35	1,093 522 00	18 225 366	8 076 869.*	44.31
G. S. & F.	68.87	66.66	316 542 35	5 275 706	1 631 655	30.81
Plt. Sys.	74.19	66.66	818 810 25	13 646 837	7 244 123	53.08
So	75 2	66.66	1 211 368 14	20 189 469	10 034 562	49.70
W. & T.	67.08	66.66	30 164 57	502 743	314 925	62.64
All railroads in State	70.8	66.66	5 107 439.17†	85 123 986	40 985 230*	48.14

*There has been deducted $914,969. on account of rolling stock on non-taxable lines and property not used for railroad purposes.

†There have been deducted from net earnings of all railroads in State viz $6,348,994.00

the following net earnings of non-taxable lines:

Central of Ga.	$356,549.78	
Western & Atl.	571,734.91	
Georgia.	313,272.14	
		1,241 554 83
Leaving net earnings as stated		$5,107,439.17

178 1897.

1. Railroad.	2. Operating ratio. Act.	Est.	3. Net earnings.	4. Net earnings capitalized at 6%.	5. State assessment.	6. % of ass't to capitalized value.
W. of Ala.	63.4	63.4	211 965	3 532 751	4 343 000	122.93
A. & W. P.	60.03	60.03	213 456	3 557 607	1 659 850	46.6
C. of Ga	63 05	63.05	1 160 996	19 349 933	7 749 026*	40.
G. S. & F.	70.22	66.66	289 705	4 828 422	1 565 350	32.1
Pl'nt Sys.	76.	66.66	751 450	12 524 172	8 457 464	67.5
So.	74.2	66.66	1 146 447	19 107 465	9 074 746	47.4
W. & T.	62.	62.	35 041	584 021	197 194	33.7
All railroads in State.	71.45	66.66	4 810 565†	80 176 083	39 730 559*	49.55

*There has been deducted $804,069. on account of rolling stock on non-taxable lines, and property not used for railroad purposes.

†There have been deducted from net earnings of all railroads in State, viz $6,152,822.66

the following net earnings of non-taxable lines.

Central of Georgia	$408 139 62	
Georgia.	327 219 74	
Western & Atlantic	606 898 30	
		1 342 257 66
Leaving net earnings, as stated		$4 810 564 99

179 1898.

1. Railroad.	2. Operating ratio. Act.	Est.	3. Net earnings.	4. Net earnings capitalized at 6%.	5. State assessment.	6. % ass't to capitalized value.
W. of Ala.....	59.5	59.5	258 059	4 300 992	3 743 000	87.02
A. & W. P....	60.35	60.35	219 830	3 663 835	1 602 027	43.72
C. of Ga.....	60.59	60.59	1 250 838	20 847 301	8 805 401*	42.24
G. S. & F.....	68.4	66.66	287 847	4 797 453	1 617 661	33.72
Plt. Sys.....	72.7	66.66	742 711	12 378 516	7 312 554	59.07
So..	70.76	66.66	1 138 873	18 981 223	10 035 270	52.9
W. & T.....	60.74	60.74	34 214	570 243	211 637	37.11
All railroads in State.....	69.2	66.66	4 781 414†	79 690 234	40 096 467*	50.31

*There has been deducted $988,349. on account of rolling stock on -on-taxable lines, and property not used for railroad purposes.

† There have been deducted from net earnings of all railroads in State, viz... ..... $6,101,683.94

the following net earnin-s of non-taxable lines.

Central of Georgia.....	392 277 20	
Westerb & Atlantic.....	584 408 07	
Georgia.....	342 584 63	
		1 319 269 90
Leaving net earnings, as stated.....		$4 781 414 04.

180 1895.

1. Railroad.	2. Operating ratio. Act.	Est.	3. Net earnings.	4. Net earnings capitalized at 6%.	5. State assessment.	6. % of ass't to capitalized value.
W. of A.....	65.4	65.4	$177 193	$2 953 223	$3 343 000	113.11
A. & W. P....	64.2	64.2	160 496	2 676 943	1 597 814	59.69
C. of Ga.....	66.4	66.4	718 954	11 982 833	4 199 426*	35.47
G. S. & F.....	78.6	66.66	297 405	4 956 766	1 497 315	30.27
Plant Sys. ...	68.65	66.66	1 127 456	18 790 947	7 531 866	40.
So..... ..	70.68	66.66	1 049 011	17 483 516	9 043 183	51.72
W. & T.....	70.52	66.66	25 420	423 677	184 472	43.5
All railroads in State.....	72.12	66.66	4 254 895†	70 914 929	37 134 622*	52.36

*There has been deducted $1,174,875 on account of property on non-taxable lines.

† There have been deducted from net earnings of all railroads in State, viz..... .... $5,736,274.92

the following net earnings of non taxable lines

Central of Georgia..	$647 200 93	
Georgia.....	377 377 76	
Western & Atlantic.....	456 800 44	
		1 481 379 13
Leaving net earnings, as stated.....		$4 254 895 79

181 1896.

1. Railroad.	2. Operating ratio. Act.	Est.	3. Net earnings.	4. Net earnings capitalized at 6%.	5. State assessment.	6. % of ass't to capitalized value.
W. & A.	66.1	66.1	$177 224	$2,953 734	$3 643 000	123.33
A. & W. P.	58.44	58.44	197 006	3 283 442	1 629 682	49.63
C. of G.	69.25	66.66	975 127	16 252 126	8 303 326*	51.08
G. S. & F.	72.90	66.66	281 185	4 686 433	1 574 812	33.6
Plant Sys.	69.48	66.66	1,034 497	17 241 632	7 428 345	43.08
So	72.5	66.66	987 765	16,462 762	9 417 307	57.20
W. & T.	71.66	66.66	26 882	448 037	194 034	43.50
All railroads in State.	73.22	66.66	4 572 147†	76 202 463	40 509 853*	53.16

*There has been deducted $626,710. on account of rooling stock on non-taxable lines and property not used for railroad purposes.

†There have been deducted from net earnings of all railroads in State, viz $5,643,382.32

the following net earnings of non-taxable lines

Central of Georgia	$331 154 06	
Georgia	243 087 67	
Western & Atlantic	496 992 80	
		1 071 234 53
Leaving net earnings, as stated		$4 572 147 79

182 EXHIBIT B TO AFFIDAVIT OF GEO. H. RICHTER.

Operating Ratio of the Four Subdivisions of Expenses.

	Total operating.	% M. W. & S.	% M. E.	% Con. Trans.	% Gen. exp.
1897.					
U. S.	68.35	14.334	11.176	39.588	3.25
Group V.					
Central	61.95	15.351	9.243	32.982	4.367
1898.					
U. S.	69.46	14.606	12.057	39.726	3.069
Group V.	69.20	16.30	12.66	36.17	3.93
Central	62.35	16.061	9.87	32.278	4.123
1899.					
U. S.	69.69	14.532	12.261	39.744	3.15
Group V.					
Central	65.19	15.769	9.152	36.372	3.878
1900.					
U. S.	70.83	15.779	13.198	38.942	2.919
Group V.	71.70	16.74	13.68	37.40	3.82
Central	65.68	16.48	9.95	35.22	4.03
1901.					
U. S.	70 85	15.779	13.198	38.942	2.919
Group V.	72.64	17.25	13.93	37.81	3.57
Central	69.04	17.95	12.02	35.31	3.76
1902.					
U. S.	70.87	15.772	13.555	38.745	2.797
Group V.	73.78	16.98	14.83	38.17	3.74
Central	71.36	18.59	13.19	35.86	3.72
1903.					
U. S.	72.17	15.289	13.808	40.337	2.734
Group V.	74.93	16.94	15.75	38.76	3.41
Central	74.45	20.27	15.46	35 12	3.60
1904.					
U. S.	72.77	14.203	14.529	41.238	2.797
Group V.	74.82	16.333	15.719	39.37	3.277
Central	73.05	19.41	13.39	36.68	3.57

183 JOHN BELL, for Plaintiff, testified:

24. I have read the affidavit of George H. Richter, filed in this cause, in which, as a basis of calculation of net earnings for all of the railroads in the State of Georgia, for the years 1895 to 1904, inclusive, the operating ratio of 66 2/3% was used in place of the actual operating ratio of all of the said roads, as appear from the reports of the Railroad Commission of Georgia, and as is set out in detail in the ten (10) tables attached to the said affidavit.

I have prepared the following table giving the same results as ascertained by George H. Richter for all of the railroads in the State of Georgia, except that, instead of using the arbitrary operating ratio of 66 2/3%, used by the Comptroller General, I have used the actual operating ratio as stated above thus obtaining the net earnings, which, when capitalized at 6%, show the theoretical values of all railroads as claimed by the Comptroller General with these I have compared the assessments on said railroads, using the same figures as used in the affidavit of George H. Richter, and, in the last column have shown the percentage ratio which the tax assessments on all railroads in Georgia for each of the years bears to the theoretical value thus ascertained.

For the whole ten years, using an average of the figures for each of the ten years, the assessments for taxation of all railroads in Georgia were 56.96 of the theoretical value of all of the railroads in Georgia, as ascertained by the Comptroller General's method

184 save only that the actual operating ratio was used instead of his theoretical operating ratio. This percentage of 56.96% is to be compared with the percentage of 109.98 which is the percentage that the assessment on the Western of Alabama bears to the theoretical value of that property ascertained by the same method. The following is the table referred to:

Year.	Operating ratio.	Net earnings.	Net earnings capitalized, 6%.	State assessment.	% of assessment to capitalized value.
1895	72.12	$3,558,794	$59,313,233	$37,134,622	62.60
1896	73.22	3,673,263	61,221,050	40,509,853	66.16
1897	71.45	4,120,249	68,670,816	39,730,559	57.85
1898	69.2	4,501,186	75,019,766	40,096,467	53.44
1899	70.8	4,474,116	74,568,600	40,958,230	54.96
1900	70.14	4,054,221	84,237,016	43,127,792	51.19
1901	69.43	5,374,930	89,582,166	46,044,870	51.39
1902	70.48	5,596,722	93,278,700	54,150,954	58.05
1903	70.68	5,919,231	96,970,516	61,402,081	63.32
1904	70.83	7,432,485	123,874,750	62,846,754	50.73
Average.	70.83	4,970,519	82,673,661	46,602,918	56.96

A Statement of Operating Ratio.

	1897.	1898.	1899.	1900.
All railroads United States	68.35	69.46	69.69	70.83
All railroads Group "V"		69.20	....	71.70
All railroads State of Ga.	71.45	69.2	70.8	70.14
	1901.	1902.	1903.	1904.
All railroads United States.	70.85	70.87	72.17	72.77
All railroads Group "V"	72.64	73.78	74.93	74.82
All railroads State of Ga.	69.43	70.48	70.68	70.83

Average for eight years:

All railroads United States	70.62
" " Group "V"	72.84 (six years)
" " in Georgia	70.37

185 that the statement set out above is a statement of the operating ratios, being the percentage of expenses to earnings, of all railroads in the United States reporting to the Interstate Commerce Commission of all railroads in Group V of the Interstate Commerce Commission's classification, which is composed of the States of Kentucky, Tennessee, Mississippi, Alabama, Georgia, and Florida, and of all railroads in the State of Georgia, for the years 1897 to 1904, inclusive, with the average of each group for the entire period. This statement has been compiled from the statistical report of the Interstate Commerce Commission, and from reports of the Georgia Railroad Commission, by deponent, and is correct.

25. The tax returns made by the Atlanta & West Point R. R. Co. to the Comptroller General as shown by his reports are as follows:

1897	$1,659,850.00
1898	1,602,027.00
1899	1,636,732.00
1900	1,585,953.00
1902	1,715,802.00
1903	1,904,970.00
1904	1,898,346.00

26. Summary of tax assessment of corporations for the years 1902 and 1903, table 19 of Comptroller General's reports for those years:

186 1902. *General Return.*

Southern System Average per mile	10,816
Central of Ga. " " "	10,248
S. F. & W. Ry. " " "	11,947
S. A. L. " " "	11,870
Miscellaneous " " "	7,633
	10,154

1903.

Atlantic Coast Line, Average per mile	15,925
Central of Georgia " " "	14,720
S. A. L. " " "	12,236
Southern " " "	12,983
Miscellaneous " " "	7,662
	12,923⅓

27th. Affidavit by F. A. Healy "that he is the Auditor of the Atlanta & West Point Railroad Company and the Western Railway of Alabama; that he is familiar with each company and with the railroads, their earnings and their values; that the same are operated together; the *the* Western Railway of Alabama from West Point, Georgia, to Montgomery, Alabama, is eighty-seven and one-half miles long, and is of equal length with the Atlanta & West Point

Railroad; and is operated on a part of the line between New York and New Orleans; that the balance of the Western Railway
187 of Alabama, west of Montgomery, Alabama, to Selma, Alabama, is fifty miles long, and is not a through line, nor is its value or earning capacity more than one-half of the remaining eighty-seven and one-half miles.

"The bonded debt of the Western Railway of Alabama now outstanding is One Million Five Hundred and Forty-three Thousand ($1,543,000.00) Dollars.

"Deponent further avers that said Atlanta & West Point Railroad Company is assessed by the State of Georgia at One Million Eight Hundred and Ninety-eight Thousand Three Hundred and Forty-six ($1,898,346.00) Dollars, which is Twenty-two Thousand One hundred and Eighty-two ($22,182.00) Dollars per mile."

28. For the purpose of further showing the excessive over valuation of the stock of the Western Railway of Alabama under the methods of valuation by capitalization adopted by the Comptroller, the plaintiff offered financial reports of the Western Railway of Alabama for the years 1895 and 1904, and also financial reports of the Atlanta & West Point Railroad Company, the highest taxed road in the State of Georgia, for the years 1895 and 1904, the material portions of said reports being as follows:

188 **28 (*a*). Atlanta and West Point Railroad Company, 1895.**

Line of Road.—Atlanta, Ga. to West Point, Ga. 86.20 miles. Sidings and other tracks, 6.29 miles. Gauge, 4 ft. 9 in. Rail (Steel) 60 lbs.

Rolling Stock, June 30, 1895.—Locomotives, 15 Cars—passenger, 9, baggage, mail, and express, 7, freight (box, 174, flat, 22, coal, 42, caboose, 6), 244, other 7,—total cars 267. Twenty-three of the coal cars are leased.

Operations, year ending June 30, 1895.—Train mileage—passenger, 242,115, freight, 94,019, other, 6,765—total 342,899 miles. Passengers carried, 220,425, one mile, 7,054,080, average mile rate 2.391 cents. Tons freight moved, 214,905, one mile, 14,257,992, average ton—mile rate, 1.73 cents.

Earnings—Passenger		$168,676.16
	Freight	246,130.55
	Mail and Express	54,731.13
	Miscellaneous	4,484.46
	Total ($5,504.84 per mile)	$474,022.30
Expenses—Transportation		$160,461.76
	Motive Power & Cars	49,409.01
	Maint. of Way & Buildings	43,321.63
	General Expenses	23,823.35
	Total ($3,216.99 per mile)	$277,015.75

Net earnings (41.57 p. c.), $197,006.55, other receipts, $2,946.23—total, $199,952.78. Payments: Interest on bonds, $73,932, dividends

on stock (6 p. c.), $73,932, taxes, $15,431.32, sundries, $4,007.79—total, $167,303.11. Surplus, $32,649.67, surplus forward ($177,388.74 less deduction, $38,335.66), $139,053.08—total $171,702.75.

General Balance Sheet, June 30, 1895.

Road, Equipment & Real Estate	$2,464,400.00
Materials and Fuel	10,058.61
Bills Receivable	29,893.83
Current Accounts	36,427.96
Cash on Hand	155,667.05
	$2,696,447.45
Capital stock	$1,232,200.00
Certificates of Indebt's	1,232,200.00
Current Accounts	60,344.70
Profit and Loss	171,702.75
	$2,696,447.45

Dividends.—From Jan., 1855 to Jan., 1896, this company paid cash dividends ranging from 8 to 6 p. c.—an aggregate of 262 p. c.

189 28 (*b*). Atlanta and West Point Railroad Company, 1904.

(1.) Line of Road owned.—Atlanta to West Point, Ga. 86.20 m. Leased; Atlanta Belt Line: Oakland to Atlanta, Ga. 6.00 m.–92.20 m. 2nd track, 2.11 m. Sidings, etc., 17.66 miles. Gauge, 4 ft. 9 in. Rail (steel) 56 to 80 lbs.

(3.) Rolling Stock, June 30, 1904.—Locomotives, 15. Cars—passenger, 14, combination, 2, dining 1, baggage and postal, 7, private, 1, freight (box, 351, flat 121, coal, 128, refrigerator, 2) 611, service, 41—total cars, 643.

(4.) Operations, year ending June 30, 1904.—Train mileage—passenger, 307,786, freight, 140,255—total 448,043 miles. Passengers carried, 348,246, carried one mile, 13,197,985, average mile rate, 2.26 cents. Tons freight moved, 522,180, moved one mile, 35,839,686, average ton—mile rate 1.31 cents.

Earnings.	1902-'03.	1903-'04.
Passenger	$273,191.18	$298,684.14
Freight	449,964.93	468,132.64
Mail and Express	75,669.26	78,391.18
Miscellaneous	9,547.38	8,439.20
Totals	$808,372.75	$853,647.16
Averages per mile	9,377.87	9,903.10
Expenses.	**1902-'03.**	**1903-'04.**
Maint. of Way & Strs	$112,601.88	$106,824.14
Maint. of Equipment	124,102.61	129,957.70
Cond. Transportation	211,963.45	236,707.17
General Expenses	37,807.07	37,767.38
Totals	$486,475.01	$511,246.39
Averages per mile	5,643.56	5,930.93

Net earnings (40.11 p. c.), $342,400.77, other receipts, $6,019.07 total $348,419.84. Payments: Interest on funded debt, $73,932, taxes, $25,650.92, reserve for improvements, $152,000, rental Atlanta Belt Line $16,000, Atlanta Terminal Co., Peters Street Viaduct, $4,490.05—total, $272,072.97. Surplus, $76,346.87, surplus forward, $119,166.96—total $195,513.83. Deduct dividends (J. & J., 3 p. c. each), $73,932. Balance, surplus, June 30, 1904, $121,581.83.

(5.) Capitalization, cost of property and results from operation for ten years ending June 30:—

	Capital stock.	Certificates of indebt's.	Cost of road.	Miles operated.	Gross earnings.	Net earnings.
1895	$1,232,200	$1,232,200	$2,464,400	86.2	$474,022	$197,007
1896	1,232,200	1,232,200	2,464,400	86.2	534,115	213,456
1897	1,232,200	1,232,200	2,464,400	86.2	554,447	219,830
1898	1,232,200	1,232,200	2,464,400	86.2	575,259	227,496
1899	1,232,200	1,232,200	2,464,400	86.2	606,694	238,128
1900	1,232,200	1,232,200	2,464,400	86.2	702,472	267,705
1901	1,232,200	1,232,200	2,464,400	92.2	740,089	255,009
1902	1,232,200	1,232,200	2,464,400	92.2	763,712	297,304
1903	1,232,200	1,232,200	2,464,400	92.2	808,373	321,898
1904	1,232,200	1,232,200	2,464,400	92.2	853,647	342,401

190	Net income.	Fixt charges.	Better-ments.	Divi-dends.	Total payments.	Balance surplus.
1895	$169,953	$63,371	.....	$73,932	$167,303	$32,650
1896	219,815	91,331	55,156	73,932	219,089	147
1897	232,849	92,639	.....	73,932	231,282	1,567
1898	244,377	93,073	.....	73,932	240,393	3,983
1899	245,924	95,356	.....	73,932	244,713	1,211
1900	278,326	95,591	75,000	73,932	256,073	22,253
1901	258,841	104,493	50,098	73,932	248,816	10,025
1902	302,376	113,832	90,964	73,932	278,728	23,648
1903	329,239	112,078	140,000	73,932	326,010	3,229
1904	348,420	115,583	156,490	73,932	346,005	2,415

(6.) General Balance Sheet, June 30, 1904.

Franchise and property	$2,464,400.00
Real Estate	27,891.45
Stocks Owned	27,500.00
Material and Supplies	45,315.13
Current Accounts	31,682.23
Cash	497,008.99
Deferred Assets	14,251.64
Total assets	3,108,049.44
Capital stock ($100 shares)	$1,232,200
Certificates of Indebt's	1,232,200.00
Current Liabilities	85,927.12
Rent Accrued, Atla. Belt Line	4,000.00
Taxes Accrued, not due	10,547.88
Reserve for Improvements	421,592.61
Profit and loss	121,581.83
Total liabilities	$3,108,049.44

(7.) Certificates of Indebtedness.—The certificates of indebtedness were issued in 1881 in the shape of a dividend bearing interest at 6 p. c. per annum.

191 Atlanta & West Point Railroad Company, 1904.

Line of Road Owned.—Atlanta to West Point Ga. 86.20 m. Leased: Atlanta Belt Line: Oakland to Atlanta Ga. 6.00 m.—92.20 miles 2d track, 2.11 m., sidings, etc., 17.66 miles. Gauge, 4 ft. 9 in. Rail (steel) 56 to 80 lbs.

Rolling stock, June 30, 1903.—Locomotives, 21, Cars—passenger 14, combination, 1, dining (½ interest), 1, baggage mail and postal, 6, freight (box, 428, flat, 121, coal, 60, refrigerator, 2), 611, service, 36, total cars 669.

Operations, year ending June 30, 1903.—Train mileage—passenger 274,118, freight, 162,093—total, 436,211 miles. Passengers carried, 301,646, carried one mile, 12,873,686, average mile rate, 2.12 cents. Tons freight moved, 540,169, moved one mile, 35,487,160, average ton mile rate, 1.27 cents.

Earnings.	1901-'02.	1902-'03.
Passenger	$266,274.93	$273,191.18
Freight	414,067.28	449,964.93
Mail and Express	74,117.38	75,969.26
Miscellaneous	9,252.62	9,547.38
Totals	$763,712.11	$808,372.75
Averages per mile	8,859.77	9,377.87

Expenses.	1901-'02.	1902-'03.
Maint. of Way & Struc	$113,455.24	$112,601.88
Maint. of Equipment	102,886.93	124,102.61
Cond. Transportation	210,177.90	211,963.45
General Expenses	39,888.29	37,807.07
Totals	$466,408.36	$486,475.01
Averages per mile	5,410.77	5,643.56

Net earnings (39.82 p. c.), $321,897.74, other receipts, $7,341.29 total, $329,239.03. Payments: Interest on funded debt, $73,932, taxes, $22,145.62, reserve for improvements, $140,000, rental Atlanta Belt Line, $16,000, total, $252,077.62. Surplus, $77,161.41, surplus forward, $115,937.55—total, $193,098.96. Deduct dividends (6 p. c.) $73,932, Balance, surplus, June 30, 1903, $119,166.96

General Balance Sheet, June 30, 1903.

Franchise and Property	$2,464,400.00
Real Estate	18,680.45
Stocks owned	2,500.00
Material and supplies	43,774.91
Current Accounts	61,652.95
Cash on Hand and in Banks	326,082.26
Cash in Transit	11,094.18
Total Assets	$2,928,184.75

Capital Stock ($100 shares)	$1,232,200.00
Certificates of Indebtedness	1,232,200.00
Interest Accrued not yet pay'e	36,966.00
Taxes Accrued, not due	10,547.88
Reserve for Improvements	129,759.13
Current Liabilities	167,344.73
Profit & Loss	119,166.96
Total liabilities	$2,928,184.75

192 28 C. Western Railway of Alabama, 1895.

Line of Road,—Selma, Ala. to West Point, Ga. 133.10 miles Sidings, 18.16 miles, Gauge, 4 ft. 9 in. Rail (steel) 56, 60 and 60½ lbs.

Rolling stock, June 30, 1895.—Locomotives, 13, Cars—passenger, 10, baggage, etc. 7, freight (box, 277, flat, 24, coal, 54, stock, 10, caboose, 3), 368, other—6, total, 391, of which 100 box and 23 coal cars are leased.

Operations, year ending June 30, 1895.—Train mileage—passenger, 233,518, freight, 98,850, mixed, 28,704, other, 18,450—total 379,522 miles. Passengers carried, 153,389, carried one mile, 6,981,080 average mile rate, 2.55 cents. Tons freight moved, 296,080, moved one mile, 17,353,446, average ton-mile rate, 1.58 cents.

Earnings—Passenger	$178,242.27
Freight	275,185.02
Mail and Express	59,453.69
Miscellaneous	10,402.17
Total ($3,963.96 per mile)	$523,283.15
Expenses—Transportation	$183,224.19
Motive Power & Cars	58,422.21
M. Way & Buildings	75,959.39
General	28,453.30
Total ($2,621.46 per mile)	$346,059.09

Net earnings (33.9 p. c.), $177,224.06. Add interest and exchange, $1,621.23, old suspense account prior to June 30, 1894, $7,048.73—total, $185,894.02. Payments: Interest on bonds, $69,435, taxes, $23,064.17, dividends, (2 p. c.) $60,000, other $201,20—total, $152,700.47. Surplus for year, $33,193.55. Surplus forward ($135,784.03, less sundry deductions, $26,714.66) $109,069.37—total surplus June 30, 1895, $142,262.92

General Balance Sheet, June 30, 1895.

Cost of Road, Equipment, Real Estate	$4,543,000.00
Materials and Fuel on hand	35,594.08
Current Accounts	119,187.26
Bills Receivable	30,861.44
Cash on Hand	55,274.50
New Equipment	1,252.86
Total Assets	$4,785,170.14

Capital stock	$3,000,000.00
Funded Debt Outst'd'g	1,543,000.00
Engine Trust Notes	1,252.86
Current Accounts	98,654 36
Profit and Loss	142,262.92
Total Liabilities	$4,785,170.14

193 (28 D). Western Railway of Alabama (1904).

(1). Line of Road.—Selma, Ala. to West Point, Ga., 132.01 miles. Sidings, 36.14 miles. Gauge, 4 ft. 9 in. Rail (steel) 56, 60, 60½, 61½, 70 and 80 lbs. On the 10th day of May, 1875, the road was sold under foreclosure and purchased for joint account of the Georgia Railroad & Banking Co., and the Central Railroad and Banking Co., of Georgia. The existing corporation (Western Ry. of Alabama) was chartered March 15, 1883, and took possession of the road April 1, 1881.

(3) Rolling Stock, June 30, 1904.—Locomotives, 16. Cars—passenger, 14, baggage, mail and postal, 7, cafe 1, private 1, freight (box 219, flat, 44, stock, 15, coal, 84, refrigerator, 9, furniture, 97, caboose, 4) 472, service 22, total 517.

(4.) Operations, year ending June 30, 1904.—Train mileage—passenger, 293,624, freight, 153,310, mixed 31,137, other 14,749—total, 492,820 miles. Passengers carried, 315,404, carried one mile, 12,997,784, average mile rate, 2.44 cents. Tons freight moved, 665,468, moved one mile, 45,415,393, average ton—mile rate, 1.18 cents.

Earnings.	1902-'03.	1903-'04.
Passengers	$299,080.50	$316,585.15
Freight	534,640.00	534,253.08
Mail and Express	75,908.81	78,335.30
Miscellaneous	24,232.87	21,264.59
Totals	$933,862.18	$950,438.12
Averages per mile	7,074.18	7,199.74
Expenses.		
Maint. of Way & Str	$161,210.91	$162,932.48
Maint. of Equipment	120,453.84	129,502.35
Cond. Transportation	250,530.88	268,095.31
General Expenses	36,950.09	41,381.59
Totals	$569,145.72	$601,911.73
Averages per mile	4,311.38	4,559.59

Net earnings, 1903-04 (36.67 p. c.) $348,526.39, add other receipts, $2,755.01,—total, $351,281.40. Payments, Interest on funded debt, $69,435, taxes, $30,365.13, reserve for improvements, $135,000—total, $234,800.13. Surplus, $116,481.27, surplus forward, $105,404.64

total, $221,885.91. Deduct dividends (F. & A., 2 p. c. each), $120,000. Surplus, June 30, 1904, $101,885.91.

(5.) Capital stock, bonded debt, revenue, etc. for ten years ending June 30:—

Years.	Capital stock.	Bonded debt.	Cost of road, etc.	R. R. operated.	Gross earnings.	Expenses & taxes.
1895.	$3,000,000.00	$1,543,000	$4,543,000	133.10	$523,283	$369,123
1896.....	3,000,000	1,543,000	4,543,000	132.01	579,804	391,740
1897.....	3,000,000	1,543,000	4,543,000	132.01	636,533	403,993
1898.....	3,000,000	1,543,000	4,543,000	132.01	603,630	414,391
1899. ...	3,000,000	1,543,000	4,543,000	132.01	668,335	430,832
1900.....	3,000,000	1,543,000	4,543,000	132.01	739,746	507,522
1901.....	3,000,000	1,543,000	4,543,000	132.01	824,910	564,858
1902.....	3,000,000	1,543,000	4,543,000	132.01	832,550	534,978
1903. ...	3,000,000	1,543,000	4,543,000	132.01	933,862	599,131
1904. ..	3 000,000	1,543,000	4,543,000	132.01	950,438	632,277

194

Years.	Net earnings.	Net income.	Interest paid.	Dividends paid.	Total payments.	Balance — or +
1895.....	$154,160	$162,830	$69,435	$60,000	$129,636	+ 33,194
1896..... ...	188,064	192,810	69,435	60,000	173,329	+ 19,181
1895.....	232,540	235,746	69,435	90,000	199,001	+ 36,746
1898.....	189,239	194,467	69,435	. . . ...	102,169	+ 92,298
1899.....	237,503	246,029	69,435	60,000	335,037	— 89,008
1900.....	232,224	244,757	69,435	210,000	280,577	— 35,280
1901	260,052	265,211	69,435	120,000	324,225	— 59,014
1902..... ...	297,572	301,903	69,435	120,000	277,522	+ 24,381
1903.....	334,731	339,234	69,435	120,000	353,890	— 14,656
1904	318,161	320,916	69,435	120,000	324,435	— 3,519

(6.) General Balance Sheet, June 30, 1904.

Franchise and Property	$4,543,000.00
Securities Owned	2,550.00
Real Estate	51,228.86
Materials and Supplies	93,615.92
Current Accounts	141,363.47
Cash on Hand and on Deposit	178,220.65
Cash in Transit	12,051.82
Unadjusted Freight Claims	21,904.28
Insured Premiums—Unexpired	6,682.44
Total Assets	$5,050,617.44
Capital Stock ($100 shares)	$3,000,000.00
Funded Debt Outstanding	1,543,000.00
Current Liabilities	218,147.17
Interest on Bonds Accrued Not Due	17,358.75
Taxes accrued not due	10,964.63
Reserve for Improvements	159,260.98
Profit and Loss	101,885.91
Total liabilities	$5,050,617.44

195 Western Railway of Alabama, 1904.

Line of Road.—Selma, Ala. to West Point, Ga. 132.01 miles Sidings, 33.86 miles. Gauge, 4 ft. 9 in. Rail (steel). 56, 60, 60½, 70 and 80 lbs.

Rolling Stock, June 30, 1903.—Locomotives, 14, Cars—passenger, 15, baggage, mail and postal, 7, café, 1, private 1, freight (box, 150, flat, 45, stock, 15, coal, 104, refrigerator, 4, furniture, 97, caboose, 4), 419, service 21—total, 464.

Operations, year ending June 30, 1903.—Train, mileage—passenger, 268,001, freight, 166,036, mixed, 37,737, other, 8,582—total, 480,356 miles. Passengers, carried, 317,833, Carried one mile, 13,240,784, average mile rate, 2.26 cents. Tons freight moved, 675,576, moved one mile, 41,937,358, average ton-mile rate, 1.19 cent.

Earnings.	1901-'02.	1902-'03.
Passenger	$275,811.29	$299,030.50
Freight	457,301.23	534,640.00
Mail and Express	73,854.00	75,908.81
Miscellaneous	25,583.49	24,232.87
Totals	$832,550 01	$933,862.18
Averages per Mile	6,306.72	7,074.18

Expenses.	1901-'02.	1902-'03.
Maint. of Way & Struc	$132,415.71	$161,210.91
Maint. of Equipment	94,831.46	120,453.84
Cond. Transportation	238,766.90	250,530.88
General Expenses	37,933.02	36,950.09
Totals	$503,947.09	$569,145.72
Averages per Mile	3,817.49	4,311.38

Net earnings, 1902-'03 (39.05 p. c.), $364,716.46, add other receipts, $4,502.79—total, $369,219.25. Payments: Interest on funded debt, $69,435, taxes, $29,985.45, reserve for improvements, $145,000, betterments to property, $19,455.22, total, $263,875.67. Surplus, $105,343.58. Surplus forward, $120,061.06—total, $225,404.64. Deduct dividends, (4 p. c.), $120,000. Surplus, June 30, 1903, $105,404.64.

General Balance Sheet, June 30, 1903.

Franchise and Property	$4,543,000.00
Securities Owned	4,500.00
Real Estate	47,441.91
Material and Supplies	123,219.11
Current Accounts	133,026.89
Cash on Hand and on Deposit	311,964.41
Cash in Transit	10,853.81
Total Assets	$5,174,006.13

Capital Stock ($100 shares)	$3,000,000.00
Funded Debt Outstanding	1,543,000.00
Current Liabilities	246,885.02
Interest on Bonds Accrued, not due	17,358.75
Taxes Accrued, not Due	10,964.63
Reserve for Improvements	250,393.09
Profit and Loss	105,404.64
Total Liabilities	$5,174,006.13

196 Funded debt consisted June 30, 1903, of 1st gold 4½s of Oct. 1, 1918. The bonds are guaranteed by the Georgia R. R. and Banking Company, and the Central of Ga. Ry. Co., by whom the capital stock is jointly owned.

197 29. A. W. SMITH, sworn for the plaintiff, testified substantially as follows:

Direct Examination:

I reside in Atlanta. I am an Attorney at Law. I acted as an arbitrator in the arbitrations of values between the State and the Central of Georgia in 1905. The Board of Arbitration were, Mr. Warner Hill, approved by the State, myself by the Central of Georgia Ry. Co., and Mr. Howard of Milledgeville, as umpire. Mr. Wright the Comptroller General appeared before that board. He made a statement before that board with respect to the methods by which the property was assessed for taxation. The testimony of Comptroller General Wright taken before the Board of Arbitrators for the Central of Georgia R. R. in 1895 was reported by stenographer. I have a copy of that report. I have examined that stenographer's report as to his testimony before the Board in regard to the method of making R. R. assessments. It accords with my recollection. The Comptroller General stated that he first undertook to equalize the railroads as among themselves. He treated the four large systems as being in the same class. For instance, the Southern, the Central, the Seaboard and the Coast Line. He took into consideration the character of the property of these four systems, as located in Georgia, and undertook to arrive at the value for the purpose of assessment for taxation on a proper basis to equalize them among themselves, and after reaching the result he arbitrarily deducted one-third, in order
198 to equalize them with other property for taxation in the State outside of R. R. property. He said that was the assessment for all railroad companies.

Cross-examination by Mr. WRIGHT:

As to my personal knowledge, as to what the general custom of the Comptroller General is in reference to accepting the value of property at a fair market value, or two thirds of it. I don't know what you mean by personal knowledge. I have been an arbitrator twice before, and the result of the arbitration was that all assessments have been 66 2-3 per cent. of the market value. I don't know whether that constitutes personal knowledge or not. Outside of the knowl-

edge that came to me as an arbitrator in these two cases I have not. That knowledge was not based alone on the admissions of the Comptroller General. It was based on the assessments of other railroads and a comparison of other railroad assessments with the one I had in hand. The whole question was up before the board of arbitration. It was two-thirds in our case and comparing that with the other roads, I thought that was a fair assessment, on the two-thirds basis. The Comptroller General stated that the railroads were charged two-thirds of their market value. With reference to that being the custom, I think any knowledge was more than what he stated; I think it was what he said and did, the actual figures that he made before us, and the result that he arrived at, that was all before us. It was from what he said and did and what was before us altogether. The
199 only knowledge of a general custom that I have is that which was acquired in my official capacity as one of the arbitrators. I was an arbitrator for the railroad; I was appointed by the railroad as its arbitrator and I was a judge. I was General Counsel for the Atlanta, Knoxville & Northern, but it never had any connection with the Central of Georgia Railway. There was no connection between the Central of Georgia Railway and the Atlanta, Knoxville & Northern. In 1905, I was not General Counsel for the Atlanta, Knoxville & Northern, because it then had no separate, corporate existence, but I represented it in some unfinished cases. Its separate corporate existence at that time had ceased. I have never been employed by the Central of Georgia in any case.

This is a part of the testimony of the Comptroller General in answer to certain questions asked by the board. There is no difference to the railroads of the State, how you divide it? No there is no difference.

Q. You endeavored to equalize it on the general basis of taxation, and in doing so, you substantially took off one-third?

A. Practically one-third, which was an arbitrary act entirely, and with a view of meeting all possible complaints that there was any excess."

(By Mr. Hill:)

—. That was taken off of all of them?

A. Off of all of them. That is correct. I do not recall that the Comptroller General took any such position as that while there before that Board, distinctly stated how he arrived at his result on a 6% capitalization plan, and if, in order to not have that result be in excess of the market value, he did not reduce the same, sometimes less than one third; and sometimes even more than one third. I don't think he adopted the 6% net earnings basis as to the Central
200 of Georgia Railway Company. As I recall, I think he adopted one or two methods; I think he had the net earnings basis, and I think he took the outstanding securities as a basis, and it was discovered that on the outstanding security basis he had $15,000,000.00 worth of securities counted twice. This discrepancy was discovered and discussed by Colonel Lawton, and he explained how he had the $15,000,000 securities in there twice. As a matter of fact the 6% basis was not used in that case exclusively. The one-third

reduction was applied to all the railroads; they always took 33 1/3% off after equalization. The Board of Arbitration applied that in pursuance of the Comptroller's statement that that was the rule. I would say that this $15,000,000.00 discrepancy was an unintentional oversight on the part of the Comptroller General. When I say that the rule was universal, what I mean by that is, that no matter what the method of arriving at the valuation was, after he arrived at it, he deducted one-third, I say that unquestionably. He said it before the Board. He said it here in the stenographic report.

(By Mr. Hill:)

Q. That was taken off of all of them?

A. Off of all of them. He did not adopt the 6% basis for the Central of Georgia Railroad. The 6% basis of capitalization was only one method of arriving at valuation. I don't know all that he said. He had the figures before us. He used different methods. One was the outstanding securities of the Company, he used that as a basis for arriving at valuation. Then he used the 6% basis. Then he
201 said in arriving at the Central R. R. Valuation, he took into consideration the Coast Line, the Seaboard Air Line and the Southern System, but in order to figure against the State, he took the Coast Line because that had the highest earning capacity of any road in the State, but he did not use the 6% basis exclusively as a criterion for the Central of Georgia Railway. The result of the different methods worked differently. The Comptroller did not state in so many words to that Court that where there was a controversy between him and the R. R. that his reason for making a reduction after he had arrived at a certain figure was to be sure that the taxes would not be in excess of the fair market value relatively to other property. I never understood that he did. He did not state before the Board that the Attorney General said that no other system could be adopted. The Attorney General did not state that before the Board. In 1903 I have a recollection that the Attorney General did appear before the Board, but we were not assessing physical properties, we were assessing franchises. My recollection is that the Attorney General said there was no provision of law for deducting 33%. That was the first time franchises were ever assessed and we didn't have any criterion to go by at all. I understood as a legal proposition that the taxation of property had to be equal. There were various methods that were used for the purpose of arriving at the valuation of the property, and when these results were obtained, 33⅓% was
202 taken off of that in order to reach its taxable value. That was the plan adopted by every method of calculation. No one method was used exclusively in arriving at the calculation, on the contrary every known method was used, I think about ten or a dozen.

30. T. A. Hammond sworn for the plaintiff, testified substantially: I am an attorney at law. Last year I was on the Board of Arbitration to assess the value of the Seaboard Air Line Railway for taxation. Mr. Warner Hill, appointed by the State, I by the Seaboard Airline and Judge Robert T. Daniel of Griffin as Umpire, composed

the Board. The Board made a reduction from the fair market value of the railroad property in finding the figures which were returned for its taxable value. The Comptroller General came before our Board. I think I know the custom in the Comptroller General's office as to assessing or accepting assessments of railroad properties for taxation in this State. I base my opinion in the first place on the fact that I have returned taxes myself to the State for years, and the Tax Receiver and I agreed always that he should accept the property at two-thirds of its value, and he so accepted it. That is my own personal observation as to the assessment of property for taxation. My opinion is also based on what was brought out before the Arbitrators and the statements of the Comptroller General. I do not wish to misrepresent or exaggerate what the Comptroller said or did. I have a stenographic report of his actual words. We were undertak-
203 ing to find out the actual value of the property, and he stated that he reduced that actual value some times one-third and sometimes a little more or a little less, to equalize it with other properties of the same kind. This is a correct transcription of his evidence at that time, and it accords with my recollection. The Comptroller General was asked this question by Judge Daniel (I give the exact words of each):

"Q. The plan adopted by you in making this assessment was taking the net income and capitalizing it at six per cent?

A. Yes, sir.

Q. The plan you adopted as the fairest and most equitable way of reaching the value of railroad property?

A. Yes, sir; that is my view, and I am sure, as I say, they are not taxed in excess of what seems to be the average assessment of other property. I generally practically reduce one-third; some times it is not quite so much, and some times it is a little more."

The Board got at the valuation of the Seaboard Air Line first by capitalizing the net income at six per cent., and then reducing one-third, as we found that was the custom. In fairness to myself and the Comptroller, I say that the first time General Wright appeared before the Arbitrators his evidence was not taken down, and that specific question was asked him by Mr. Daniel; and I base my opinion not only on that testimony but on what he said when he first appeared before the board.

204 Cross-examination:

In the stenographic report referred to by me the following also appears:

By Mr. DANIEL:

Q. The plan you adopted in making this assessment was taking the net income and capitalizing it at six per cent.?

A. Yes, sir; that is what the Comptroller General said. It is true General Wright stated that in addition to that it sometimes appeared to him that possibly the six per cent. plan would not be entirely satisfactory to the railroad representative or himself, in which event he would arbitrarily reduce it in order to make it equal, if it was not beyond the market price he would reduce it sometimes

one-third, sometimes not so much and sometimes a little more. I did not understand General Wright as stating that his purpose in making these reductions was so that the assessment would not exceed a fair value of the property. I did not understand the Comptroller General's language or statement was to the effect that after he had arrived at a result by his method of capitalizing at six per cent. that if he thought that was in excess of the market value he arbitrarily reduced it by one-third, or a little more or a little less. The idea I gathered from this testimony was that it was his purpose to find out the value of the whole railroad property, tangible and intangible, and then capitalize the whole on a six per cent. basis. (We found this amount to be $22,000 per mile.)

He did not assess at that. He said that he arbitrarily reduced
205 the assessment below that in order to assess it on a fair basis, if the other railroads and other property in the state, and that it should not exceed its fair market value. The Comptroller General also testified before the Board of Arbitration as follows: "A. Which gave me the net earnings of the combined lines, and which shows net earnings $3,783,369.00. I capitalized this at six per cent., which gives me a valuation of $63,000,000.00; the capitalization based on six per cent. is $22,492. a mile, and I made the assessment per mile $15,347.00.

By Mr. DANIEL:

Q. How did you get the difference between $22,000 and $15,000? Arbitrarily. Reduced it?

A. Yes; in other words to do the road absolute justice and not to tax them more than their actual market value, or what appears to be their market value, everything else considered, I just simply made the reduction, and put it at $15,347.

31. Plaintiff introduced in evidence letter from William A. Wright, Comptroller General to Forrest Adair, Vice President Atlanta Water & Electric Power Company, dated July 25th, 1905, the material portions of which are as follows:

I have examined the report showing the capitalization of your company, gross income for three months and operating expenses for the same period. It would appear that your gross income for three months was $26,000.00, operating expenses, $11,000.00, leaving $15,000.00 as the net income for three months. This would give a net income for 12 months of $60,000 which capitalized at
206 6% would show the property to be worth in round figures a million dollars. Allowing a reduction of one-third on this valuation, which it is claimed is the percentage at which other property in this State is taxed, would leave a valuation of the property taxable of $666,667.00. Your return of the tangible property appears to be $242,050.00, which deducted from the above figures, would leave $424,617.00. It will therefrom be seen that there is $424,617.00 of valuation of either tangible or intangible property which would escape taxation on a basis of your return.

You have made no return of franchise, claiming that you have no franchise which is of value, I cannot concede that this is true

from a legal standpoint. The franchise Tax Act imposes a tax upon certain corporations, among the number, water and electric companies, and provides further that where the franchise of such corporations is not returned that the Comptroller General in assessing the property shall double tax it.

I therefore, suggest that you make a return of the franchise at some nominal value, if you desire to do so, so as to save the company the double tax penalty. I will then if necessary make an assessment upon the franchise, and of course will have to use the data which I have given you above as a basis upon which to return the value of said item of said property. The tangible property being returned at $242,050.00, if this valuation is insisted upon as correct, as stated above, there would remain the valuation of
207 $424,617.00, that would go untaxed or would have to be taxed under the head of franchise.

32. Plaintiff introduced in evidence letter from William A. Wright, Comptroller General, to Forrest Adair, Vice President Atlanta Water & Electric Power Company, dated August 14th, 1905, the material portions of which are as follows:

I am in receipt of yours of the 8th inst. enclosing affidavit of gross income and operating expenses of your property for the months of April, May and June, from which it appears that the operating expenses have exceeded the gross income, whereas for the three previous months the net income was $15,000.

The abnormally large operating account for the last three months must necessarily be due to additions or betterments to the property, and this being true, it would not be a basis upon which to equitably assess the franchise of your company.

It appears from the sworn financial report, filed under date of the 30th of June, that you are paying 5% interest on $1,350,000 of bonds. It also appears from the same report that the net earnings capitalized at 6% would make the property worth $1,000,000 in round figures. Making a reduction of one-third to bring the property to the basis at which it is claimed other property in the State is assessed, would make the value of this property $666,667. You have returned the tangible property at $242,050. This
208 amount deducted from the above ascertained value would leave the tangible value attaching to this property $424 617.

I note from the typewritten endorsement attached to this return that the company protests that its franchise has no value but in order to comply nominally with the law it is entered at $100. My contention is that this property is worth for taxation, based upon its bonded indebtedness $1,350,000, and based upon its net income capitalized at 6% it is worth $666,667. At the valuation at which you have returned the tangible property the intangible value of the property would therefore be $424,617.

33. Forrest Adair, sworn for the plaintiff:

I am Vice President of the Atlanta Water & Power Company, and the one that had the conversation with the Comptroller General about the subject matter of the returns of the company for taxation.

I recall the two letters signed William A. Wright, Comptroller General and dated Aug. 14th, 1905, and July 25, 1905. In the letter of Aug. 14, 1905, appears the following language of the Comptroller: "The abnormally large operating account for the last two months must necessarily be due to additions or betterments to the property, and this being true it would not be a basis upon which to equitable assess the franchise of your company." The Comptroller refused to use the returns of income for the three months.

He declined to consider that on the idea expressed in this
209 paragraph, and as expressed to me personally, that it must necessarily have been used for betterments, and not in the nature of regular operating expenses. I was present at the arbitration that was had in regard to the Company's property. At that time Mr. Wright, Comptroller General, appeared before the board of arbitrators; and in explaining how he arrived at the assessment that he had put on the company he gave the same figures that are given in these two letters, as to how he capitalized the net income, and then stated further that he took off 1/3 as stated in that letter, to bring it upon the usual basis upon which property is taxed in the state.

210 *Evidence of Def'ts.*

34. Transcript of the record in the Supreme Court of the United States on Writ of Certiorari in the case of Wm. A. Wright, Comptroller General, Petitioner, *vs.* Louisville & Nashville Railroad Company and Atlantic Coast Line Company, the material parts of which Transcript are as follows: Bill of Complaint filed August 22nd, 1901, by the above named Railroad Companies, citizens respectively of Kentucky and Virginia, against William A. Wright and The Georgia Railroad and Banking Company, a corporation, citizens of Georgia, in the United States Circuit Court for the Northern District of Georgia, which after the allegations as to parties and their citizenship and that the amount in controversy exceeded Two Thousand ($2,000) Dollars exclusive of interest and costs, further alleged "That on the 7th day of May, 1881, the said Georgia Railroad and Banking Company, hereinafter styled the Georgia Company, made and entered into a certain indenture of lease with William M. Wadley, wherein and whereby it leased to him and his assigns for and during the term of ninety-nine (99) years from and after the first day of April, 1881, all of the railroads and rights of transportation of the said Georgia Company, and certain other properties and interests of said Georgia Company, in which said lease the following property and interests

was devised, to-wit: All of the rights or ownership, manage-
211 ment, control and use of the Western Railroad of Alabama, which the said Georgia Company then had or was entitled to; the same being an undivided one-half (½) ownership in fee simple of the said railroad and franchises of the said Western Railroad of Alabama, which the said Georgia Company had under the authority of an Act of the Legislature of Georgia, approved the 27th day of February, 1875, acquired; The Central Railroad and Banking Com-

pany acquiring and being the owner of the other half interest therein, under and by virtue of the same Act.

"Orators show that under and by the terms of said lease the said Lessee or his assigns covenanted to keep the railroads and appurtenances and means of transportation leased in first-class condition and to indemnify the Georgia Company against any damages losses or liabilities which might be incurred by reason of the operating of the railroads so leased; and further agreed with the termination of the Lease that they would return the property therein rented, farmed out and assigned, in as good condition as received, and unimpaired in value, that is to say, as well adapted to the business of transportation as said leased property then was. Said Lessee also covenanted and agreed for himself and assigns, that he would pay all taxes which might be payable upon any of said leased property, except such taxes as under the charter of the Georgia Company might be payable upon the rental reserved by the Lease, or such part thereof as might be taxable, or as might be collectible by law from
212 the Georgia Company on the shares of its stock in the hands of it shareholders, and that said Lessee and his assigns thereby became specially charged with the payment of all taxes upon the half interest of said Georgia Company in the said Western Railroad of Alabama as it then existed or might thereafter exist.

"Orators show that by the terms of said Lease it was agreed that said Western Railroad of Alabama might be by its owners incorporated, and that when so incorporated the shares of stock representing the interest of said Georgia Company in said Lease should as to possession, voting and all other matters be governed by the terms of said lease.

"Orators show that said William M. Wadley went into possession of all the properties demised under said Lease, including said one-half interest of said Georgia Company in said Western Railroad of Alabama, and that shortly thereafter the interest of said William M. Wadley in said Lease became vested in your orator, The Louisville and Nashville Railroad Company, and in The Central Railroad and Banking Company of Georgia, as co-Lessees. That subsequently, by different assignments the entire interest in said Lease and the ownership thereof became vested in your orator, The Louisville & Nashville Railroad Company, and that your orator, the said Louisville & Nashville Railroad Company was accepted by said Georgia Company as the sole Lessee of said demised property. That
213 under said Lease, among other things it is provided, that securities of the value of one million ($1,000,000) Dollars shall be deposited to secure the faithful performance by said Lessee of the covenants of said Lease as in said Lease specified; and that your orator, the said Louisville & Nashville Railroad Company, after being accepted as such sole Lessee made said deposit of said securities, and that the same were accepted by the said Georgia Company, and your orators recognized as such sole Lessee as aforesaid.

"Orators show that since said time, to-wit: on or about the first day of July, 1899, your orator, The Atlantic Coast Line Railroad Company, acquired from the said Louisville & Nashville Railroad

Company by assignment a one-half interest in said Lease, and all the rights and privileges thereof, and was accepted by the said Georgia Company as a co-Lessee, with said Louisville & Nashville Railroad Company; and it and the said Louisville & Nashville Railroad Company are now the co-Lessees of said Georgia Railroad and Banking Company under said Lease, and are entitled to all the rights, privileges and properties, and subject to all the duties and burdens therein conveyed and thereby specified. A copy of said Lease will be to the Court shown upon the trial of this cause.

"Orators show that the said Western Railroad of Alabama extends from the City of West Point, in the State of Georgia, to the
214 city of Selma, in the State of Alabama. That all of said railroad except about one-quarter (¼) of a mile in length lies in the State of Alabama. That such portion of said road as lies within the State of Georgia was built by the express permission of the State of Georgia, and the said railroad was by Act of the Legislature granted permission to build the same within the limits of this State.

"Orators show that it and its predecessors in said Lease have at all times since the commencement of said Lease paid to the State of Georgia and to the State of Alabama, in respect to the several portions of said Western Railroad of Alabama lying, respectively, in each, and in the several Counties of each, all taxes which have been assessed thereon and demanded by said States of Alabama and Georgia, respectively, or by the several Counties and Cities of said States.

"Orators show that some time during the year 1875, the property now known as the Western Railroad of Alabama was purchased at foreclosure sale under and by virtue of the aforesaid Act of the Legislature of Georgia authorizing them so to do, by the said Georgia Railroad and Banking Company and the Central Railroad and Banking Company of Georgia and the said two railroad companies went into possession of the said Western Railroad of Alabama and operated the same for a number of years as tenants in common, without any further or other charter, and without organizing the
215 same as a separate corporation. That said railroad was being so operated at the time the said Indenture of Lease above mentioned was executed by said Georgia Company to the said William M. Wadley, and that it continued to be so operated by the said Central Railroad and Banking Company of Georgia and by the said Wadley and his assigns for a short period after the execution of said Lease. That not long after the execution of said Lease, and in accordance with the permission therein accorded the owners of the said Western Railroad of Alabama, viz: the said Georgia Company and the Central Railroad and Banking Company of Georgia organized a corporation under the laws of the State of Alabama, known as the Western Railway of Alabama, for the purpose of operating said Western Railroad of Alabama, and issued stock in said corporation as evidence of the ownership of said two railroad companies, to-wit: fifteen thousand (15,000) shares each, or a total capital of three million (3,000,000) Dollars. Said charter was obtained from the State of Alabama, and the same was organized as an organization

under the laws of the State of Alabama, and has remained so ever since, owning no property in the State of Georgia except the small portion of railroad hereinbefore set forth,—the same being located in the County of Troup in said State.

"Orator show that while said fifteen thousand (15,000) shares of stock were issued in the name of The Georgia Railroad and
215 Banking Company, the control of said stock and the power to vote the same has been at all times under said Lease, and by virtue of the irrevocable powers of attorney executed thereunder, vested in the Lessees or their assigns, and that all liability to pay any taxes which may be due or collectible on said shares of stock has been at all times under said Lease an obligation of said Lessees and assigns, and not of the said Georgia Company.

"Orators show that while all taxes have been paid which have been required by either the State of Georgia or Alabama, or any County or City thereof, on said Western Railroad of Alabama, no taxes have at any time up to the present year been demanded either of them or their predecessors under said Lease, or of the said Georgia Company, on account of or on said shares of stock, but that the same have been recognized as not being taxable, and as being merely the evidence of the ownership of the said railroad property which said shares of stock represent.

"But your orators show that within the last few weeks the said W. A. Wright, who is Comptroller General of the State of Georgia, acting as such Comptroller-General, has demanded of the said Georgia Company that it pay taxes to the said State of Georgia for the year 1900; the said taxes amounting to about seven thousand ($7,000) Dollars or other like large sum, as due to the State of Georgia for State taxes upon said shares of stock of the Western Railway of Alabama.

217 (Stricken by Plaintiff by leave of the Court.)

"Orators show that the said amount of taxation will for remaining years of said Lease amount to a very large sum and constitute a great and additional burden upon your orators as Lessees of said property, if the same can be collected.

"Orators show that said Georgia Company under the terms of the Lease between itself and orator is not liable to pay the taxes above demanded, and has no present interest in resisting the same. That the same will not in any wise diminish the revenue which the said Georgia Company will receive, nor in any way deplete the same when received; and orators upon information and belief charge that the said Georgia Company will not resist the payment of said taxes, and that the said Georgia Company is about to return the same to the said Comptroller-General in its tax returns; and that if the said Comptroller-General shall issue execution against it for taxes thereon, will not resist the payment of the same, but will suffer the same to be collected out of the property leased by your orators, and your orators will suffer the impairment of their rights under said Lease, and their enjoyment of such portion of the leased property as may be seized for the purpose of making the said taxes.

"That your orators will be without legal remedy to resist the pay-

ment of said taxes if so coerced, and will be without remedy
218 unless they are now afforded a remedy by this Honorable Court in this proceeding.

"Orators aver that under the laws of the State of Georgia, the said shares of stock are not liable to taxation, and that said Comptroller-General will be proceeding without law or color of law in attempting to collect the same. But so it is, that the said Comptroller-General has notified said Georgia Company and your orators that he proposes to issue executions and to proceed forthwith to enforce the payment of said taxes if the same are not voluntarily paid.

"Your orators show that the attempted collection by the said Comptroller-General of taxes upon these shares of stock of the Western Railroad of Alabama, and the enforcement of such pretended tax, will take their property without due process of law, and deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and are therefore illegal and void.

"Your orators show that said attempt to collect said tax is illegal and void, also:

(*a.*) Because there is no law in the State of Georgia authorizing the taxation of railroad shares of stock in the hands of the owners thereof.

(*b.*) Because under the laws of the State of Georgia, shares of railroad stock are mere representations of the railroad prop-
219 erty itself, and such property must be taxed under the laws of the State of Georgia for the taxation of railroads where located in the State of Georgia, and where not located in the State of Georgia is not subject to be taxed by the State of Georgia.

(*c.*) Because if taxes were levied upon this stock, the property which it represents being located in the State of Alabama, the result would be taxation by the State of Georgia of property located in the State of Alabama, which is illegal.

(*d.*) Because the said State of Georgia doth not tax under its laws railroad shares issued by railroad corporations of the State of Georgia, but recognizes the same as mere certificates of interest in the railroad property which is itself taxed, and there is no law of the State of Georgia creating any other or different rule for railroad shares issued upon properties lying without the State of Georgia.

"Your orator being remediless under the rules of common law and unable to obtain any relief except in a Court of Equity, to the end that the several Defendants may, if they can, answer the several charges hereinbefore made against them, waive discovery from the said Defendants and each of them, and pray:

1st. That it be adjudged that the said shares of stock passing to your orators under said lease are not subject to be taxed by the said State of Georgia.

2nd. That the said Georgia Railroad and Banking Com-
220 pany be enjoined from making any return of said shares of stock for the purpose of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed.

3rd. That the said William A. Wright, Comptroller-General, be enjoined from issuing any execution or taking any steps to collect any taxes upon said shares of stock, and that it be further decreed that he is without warrant or authority at law to undertake to collect taxes thereon, and is not authorized as Comptroller-General so to do."

This Bill of Complaint was signed by Jos. B. & Bryan Cumming, and King & Spalding as Complainants' solicitors, and was verified by the oath of T. K. Scott, Complainants' General Manager.

Subpœna issued thereon, and service thereof was acknowledged on August 22, 1901, by J. M. Terrell, Attorney-General, as counsel for Wright, Comptroller-General, and by The Georgia Railroad and Banking Company by Jacob Phinizy, President.

On November 2, 1902, J. M. Terrell entered his appearance as solicitor for Wright, Comptroller-General.

On June 2, 1902, the said Wright, Comptroller-General, made answer as follows: "The Defendant, William A. Wright, Comptroller-General, for answer to the bill, or so much thereof as he is advised it is material for him to answer thereto sayeth:

221 1. That under the rule of this Court allowing matters of demurrer to be set up by way of answer, he avers as reason why the relief prayed for in the above stated case should not be allowed, the following:

(*a.*) That said Complainants have not by their said bill made such a case as entitled them in a Court of Equity to any relief from or against this Defendant touching the matters contained in said bill, or any of such matters.

(*b.*) That there is no equity in said bill.

(*c.*) That Complainants have full, adequate and complete remedy at common law.

2. In addition to the above stated matters of law as reasons why the relief prayed for should not be granted, this Defendant adopts as his answer in this case the averments of fact contained in the agreed statement of facts this day filed in said case, and by reference makes said agreed statement of facts a part of his said answer.

3. Defendant denies so much of the allegation in paragraph 9 of the bill as alleges the payment by the Western Railway of Alabama or the Western Railroad of Alabama of any taxes to the State of Georgia, or any County or City thereof.

(Signed) BOYKIN WRIGHT,
(Signed) J. M. TERRELL,
Attorney-General, of Counsel for Defendant."

222 On the hearing Honorable W. T. Newman, Judge presiding, rendered the following opinion:

"This is a bill filed by the Complainants against William A. Wright, Comptroller-General, to enjoin the latter from collecting from The Georgia Railroad and Banking Company, State taxes on certain shares of stock in the Western Railway of Alabama, Complainants being the Lessees of the Georgia Railroad and liable under the terms of the Lease for taxes assessed against it.

"The following stipulation has been entered into by the parties in writing and filed with the record in the case:

'In order to obviate the making of proof in the foregoing case it is agreed between the parties as follows:

(1.) That the citizenship and residence of the several parties Plaintiff and Defendant are as stated in said Bill of Complaint, and that the amount in controversy therein involved exceeds the sum of two thousand dollars, exclusive of interest and costs.

(2.) It is agreed that The Georgia Railroad and Banking Company did on the 7th day of May, 1881, enter into a certain Indenture of Lease with William M. Wadley and assigns, and that a copy of said Lease hereto attached and marked Exhibit "A" shall be taken as a true copy thereof, and shall be used and admitted in evidence in lieu of the original.

223 (3.) It is further agreed that subsequently, on February 2nd, 1898, by different assignments, the Louisville & Nashville Railroad Company became the sole assign of said Lease, and the Lessee of said leased property and interest described therein in lieu of the said Wadley, and was accepted by The Georgia Railroad and banking Company as such sole Lessee, and that it, after being accepted, deposited one million dollars in securities acceptable to The Georgia Railroad and Banking Company, to secure the faithful performance of said Lease according to the covenant made in said Lease in respect to the making of such deposit.

(4.) It is further agreed that on or about the — day of ——, 1899, The Atlanta Coast Line Railroad Company, acquired from the Louisville & Nashville Railroad Company by assignment, a one-half interest in said Lease, and was accepted by The Georgia Railroad and Banking Company as a co-Lessee with said Louisville and Nashville Railroad Company, and that the said Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company are now the co-Lessees of said Lease and hold the same as fully and to all intents and purposes as the said William M. Wadley did.

(5.) It is agreed that the Western Railroad of Alabama is a railroad extending from the City of Selma via the City of Montgomery in the State of Alabama, to the City of West Point in the

224 State of Georgia, and that all of said railroad except one-fourth of a mile in length lies in the State of Alabama; that the portion of said road lying in the State of Georgia was built in this State by virtue of an Act of the General Assembly of the State of Georgia, passed on the 26th day of December, 1837, incorporating the stockholders of the Montgomery Railroad Company under the name and style of the Montgomery & West Point Railroad Company, within the corporate limits of the town of West Point. That this corporation subsequently became the Western Railroad Company of Alabama, and as such owned said railroad, including the part thereof so built under said Act of 1837, in the city of West Point, Georgia. It is agreed that said Act is a public law of the State of Georgia, and as such to be taken judicial notice of by the Courts, and may be refered to as though herein set out, and is to be found in the published Acts of 1837, pages 201, 202.

(6.) It is further agreed that all of the property of the Western Railroad Company of Alabama, including the said portion lying in the State of Georgia, was during the year 1875 offered for sale under a foreclosure of mortgage existing thereon, and was sold at judicial sale, and that the said property was purchased by The Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia, two railroad com-
225 panies of the State of Georgia, under and by virtue of an Act of the General Assembly of the State of Georgia, enacted on the 27th day of February, 1875, and entitled "An Act to authorize and provide for the purchase of the Western Railroad of Alabama, its property and franchises by The Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia, or either of them, and to authorize said companies to issue bonds in certain cases and to authorize connecting lines to aid in said purchase and issue bonds therefor, and for other purposes," which said Act is published in the Acts of the General Assembly of 1875, pages 235 and 236; and it is agreed it is a public law and may be referred to as though herein fully set out.

(7.) It is further agreed that said two last named railroad companies held said Western Railroad of Alabama without incorporating the same, and operated the same as tenants in common until after the making of the said Lease hereto exhibited, to William M. Wadley. That on the — day of ——, 188-, a charter was applied for under the general laws of the State of Alabama, and a certificate of such charter was issued by the Secretary of State for the State of Alabama, in conformity with such laws incorporating the Western Railway of Alabama, and that to that corporation so incorporated the said Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia
226 conveyed the Western Railroad of Alabama, extending from Selma, Alabama, via Montgomery, to a connection with the Atlanta & West Point Railroad in the city of West Point, Georgia, and that they received from said new corporation its entire capital stock, to-wit: 15,000 shares of one hundred dollars each to The Georgia Railroad and Banking Company, and 15,000 like shares to The Central Railroad and Banking Company of Georgia, or a total capital stock of three million dollars, or 30,000 shares of one hundred dollars each. That said railroad company so incorporated is a corporation of the State of Alabama, and owns no property in the State of Georgia except the small portion of railroad hereinbefore set out which is located in the County of Troup.

(8.) It is further agreed that the 15,000 shares of stock were issued to, and stand in the name of, The Georgia Railroad and Banking Company, but that an irrevocable power of attorney or proxy to vote the same has at all times been issued and existed under said Lease in favor of the Lessees or assigns, or such person as they might designate to vote said shares.

(9.) It is agreed that the blank annually furnished by the Comptroller-General to The Georgia Railroad and Banking Company to use in making its tax returns contained amongst others the fol-

lowing questions, to-wit: "Number stocks and bonds owned by the company," and "Value of all property not enumerated, and value of tools." That in no other way than in furnishing these
227 blanks did the Comptroller-General make any demand for taxes upon said shares of stock until the 25th of May, 1901, when he specifically demanded of The Georgia Railroad and Banking Company that it pay taxes on said shares of stock for the year 1900 to the State of Georgia which said taxes so demanded amount to between $7,000 and $8,000. A copy of said blank is attached.

(10.) It is further agreed that it is provided by the terms of said Lease that whatever taxes are collectible from said stock during the entire term of said Lease, Exhibit "A," are payable by the Lessee thereunder, or if the same are lawfully collected from said Georgia Railroad and Banking Company, that said Lessees are liable to reimburse the same to said Georgia Railroad and Banking Company, without in any way diminishing the rental which is payable by said Lessees under said Lease.

(11.) It is further agreed that stockholders in the Atlanta & West Point Railroad Company, the Georgia Railroad and Banking Company, the Augusta & Savannah Railroad Company, and of all corporations which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation.

(12.) It is further agreed that the Code of Alabama shall be admitted without proof."

The foregoing statement of facts, signed by counsel for the respective parties, sufficiently shows all the facts pertinent to
228 the question involved here, which is, whether shares of stock in the Western Railway of Alabama, an Alabama corporation held by the Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia. One additional fact may be mentioned. It is alleged in the bill and not denied in the answer, or negatived in any way in the agreed statement of facts, that the Western Railway of Alabama has paid all State and County taxes required of it in the State of Alabama.

It may be conceded first, as a general proposition, that the State has the power to treat shares in a corporation as distinct and separate property in the hands of the holders, should it desire to do so for purpose of taxation; and further, if suitable legislation is enacted, it may carry out this purpose. This is supported by abundant authority, and is not questioned, as I understand, by counsel for the Complainants in this case. Cook on Stock and Stockholders, Sec. 563; Tennessee *v.* Whitworth, 117, U. S. 129.

Conceding this to be true, however, the real contention of counsel for Complainants here is that the State of Georgia has not adopted this policy, and that the action of the Comptroller-General in attempting to tax these shares is without authority of law.

229 In endeavoring to ascertain what the law of Georgia is on this subject it may be remarked first, that there is no express legislation contained in the body of statute laws of this State either in the Code or subsequent to its adoption, which authorizes the collection of this tax. Reference will be made, hereafter, to what is

contained in the Tax Act adopted by the Legislature of Georgia in 1898, levying taxes for the years 1899 and 1900, under which Act the authority to collect the taxes in question here is claimed.

It being true that there is no such express legislation, and it will be important to ascertain what the rule of policy of the State otherwise has been, and this seems to be stated in a decision by the Supreme Court of the State in the case of Wright, Comptroller-General *v.* Southwestern Railroad Co., 64 Ga., 783. In the opinion in that case by Jackson, Justice, it is said, with reference to an effort of the State to tax the Southwestern Railroad Company, that,

'Stock in the company's own road, held by itself, or in other roads in this State, whose charters limit or exempt taxation thereon, and whose income is taxed, is not liable; and stock held by the company in railroads without the limits of this State is not taxable here. Stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located.'

230 What the Court meant to say in the foregoing paragraph is emphasized by the immediately succeeding language, as follows: 'But bonds, notes, and all other mere evidences of debt, follow the *situs* of the creditor, no matter where the debtor lives.'

It is said that what has been quoted is a mere dictum and should not be regarded as authority. There does not appear to be a good reason for this claim. The question must have been directly involved or there would have been no reason whatever for the Court to express any opinion on the subject. There must have been an effort on the part of the Comptroller-General to tax, as a part of the property of the Southwestern Railroad Company, shares held by it in railroads without the limits of the State, in order to have justified any reference to the matter.

It is also—that this was a decision on an appeal from the grant of an injunction *pendente lite*, and was not a final decision in the case. In the concluding paragraph of the opinion this is said:

"The judgment granting the writ of injunction until the hearing is therefore affirmed, and it is ordered that on the hearing the case be tried on its merits, and that such issues be made as shall bring out the whole truth on the facts, and the law as indicated above be

231 applied to those facts, subject to be modified by the chancellor as facts other than those in this record may require.'

It is evident from this that the Supreme Court was stating the law of the case, and that the duty of the Court below was to apply that law, as thus announced, to the facts, which facts, it is indicated, might be subject to modification. No suggestion was made that there might be any change in the law as stated by the court.

It is claimed, however, that the decision above referred to was made under the Constitution of 1868, and that according to the decision of the Supreme Court of the State in Atlanta National Building and Loan Association *et al.*, *v.* Stewart, Tax Collector, 109 Ga., 80, a distinction is drawn in the rules as to taxation under the Constitution of 1868, and that under the Constitution of 1877. The first two head notes of that case are as follows:

'1. The Constitution of 1868 provides that 'taxation on property

shall be ad valorem only, and uniform on all species of property taxed.' As long as that Constitution was in force the General Assembly had power to exempt one species of property and tax another, and this exemption could be either express or result from a failure to provide that a given species of property should be taxed.

232 '2. The Constitution of 1877 provides that 'all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.' Under this Constitution the General Assembly can not lawfully either expressly exempt from taxation, or accomplish this result by a failure to tax, any property except that which in the Constitution itself the General Assembly is expressly authorized to exempt.'

What is thus stated in the head notes, and more elaborately in the opinion, is beside the exact question involved here, which is, whether the State for purposes of taxation, treats the shares in a railroad corporation as property distinct and separate from that of the corporation which it represents. Unquestionably the effect of the decision of the Supreme Court of the State in Wright, Comptroller-General *v.* Southwestern R. R. Co., *supra*, is that the State does not so regard shares of stock in a railroad corporation located without the State. It holds that "stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least and taxable by the State in which the road is located."

Neither do I understand the 14th head note to the opinion in Building and Loan Association *v.* Stewart to be important, or in any way controlling in this case. It is as follows:

233 "The General Assembly has power to levy a tax upon the shares of stock of an incorporated company as the property of the shareholders, and also a tax upon the property of the corporation."

The power, as has been stated, may be conceded; the question is whether the State has exercised it. The following language from the opinion will throw some light upon what in this respect, was really determined:

'Possibly it may be competent to provide against taxing the shares of stock where all the property which gives them value has been taxed. I do not decide as to this because it is not before me directly. But in this case, the Act provides in terms, not for relieving shareholders against what might be claimed to be double taxation, if the company had paid on everything conferring value on the shares; but on the contrary, it provides for the company to pay only on the market value, not of its property, but of shares belonging to certain of its stockholders on which no loans have been made. It is exactly a reverse proceeding. Suppose it be true that, if all the property which gives shares of stock a valuation has been paid upon, it is equivalent to paying on the shares and the owners need not pay again, or at least that the Legislature may provide that they need not pay again, the provision of this Act is that the company will pay on the market value of the shares of some of its stockholders, it need not pay on any of its property.'

234 There is nothing whatever in this decision to the effect that the State treats shares of stock in corporations as separate and distinct from that of the corporations for purposes of taxation, when the corporation itself is taxed on the property which the shares represent.

It is claimed, however, that the Act of the Legislature of Georgia levying taxes for the years 1889 and 1900 (Acts of 1898, p. 21), by its provisions authorizes and requires the collection of the taxes on the shares in question.

In the 16th Section of this Tax Act it is provided that,

'In addition to the questions now propounded to tax-payers by the tax receivers, questions shall be framed by the Comptroller General to reach all property upon which a tax is imposed by this Act, and especially the following questions.'

The 30th question is as follows:

'How many shares of stock did you own on the day fixed for the return of property for taxation issued by the corporations located without the State?'

'31st. What was the gross nominal value thereof?'

'32nd. What was the fair market value thereof?'

'33rd. How many shares of stock did you own on the day fixed for the return of property for taxation, issued by corporations within the State, the capital stock of which or the property of which is not returned by such corporation for taxation?'

235 '34th. What was the gross par value thereof?'

'35th. What was the fair market value thereof?'

Are these questions in effect such an express legislative enactment as directs a tax levy on shares of the character in question? There should be a reasonably clear expression of legislative intent. Indeed, if this is to be construed as double taxation, the legislative intent should be unmistakable. In Tennessee *v.* Whitworth, 117 U. S., 129, in the opinion by Mr. Chief Justice Waite, it is said:

'In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a State, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect;

236 but if they do it is because the Legislature has unmistakable (unmistakably) so enacted. All presumptions are against such an imposition. See also Desty on Taxation, p. 199 (Sec. 39); Cooley on Taxation, p. 155.

But whether this be strictly double taxation or not, as it is levied by different States, still there should certainly be a clear legislative

expression that railroad shares are property for taxation in Georgia, in view of the distinct utterance by the Supreme Court to the contrary in Wright *vs.* Southwestern R. R. Co., *supra.*

It is admitted by the Comptroller-General in the agreed statement of facts in this case, that "stockholders in the Atlanta & West Point Railroad Company, The Georgia Railroad and Banking Company, the Augusta & Savannah Railroad Company and all corporations which pay taxes upon their property to the State of Georgia, do not return their shares of stock for taxation."

Shares of stock owned by citizens of Georgia, in railroads within the State of Georgia, can certainly with as much justice be classed as separate and distinct property in the hands of the holders of such shares, as can the shares in railroad corporations without the State of Georgia. It would seem that if the district in the case of Building & Loan Association *vs.* Stewart, *supra,* is to be applied as contended for, that it would necessarily embrace shares in domestic corporations, as well as shares in foreign corporations. If both are
237 property, then under the construction of the Constitution of 1877 announced in this case, both are subject to taxation, neither being expressly exempted by the Constitution; and yet it is conceded by counsel for the Comptroller-General that the State has not attempted to tax shares in domestic corporations and that it would be wrong for it to do so.

Under the Georgia law, where the tax is sought to be collected without legal authority, an injunction is the proper remedy. Wright, Comptroller-General, *vs.* Southwestern R. R. Co., 64 Ga., 783-801; S. F. & W. R. Co. *vs.* Morton, 71 Ga. 24-30; Wright, Comptroller-General, *vs.* R. R. Co., 85 Ga., 649-650; Sheibley *vs.* Rome, 107 Ga., 384.

The same relief may be granted in the United States Court as in a State Court, if the citizenship is proper.

A part of the agreed statement of facts in this case is as follows:

'It is further agreed that it is provided by the terms of said Lease that whatever taxes are collectible from said stock during the entire term of said Lease, Exhibit "A," are payable by the Lessees thereunder, or if the same are lawfully collected from said Georgia Railroad and Banking Company without in any way diminishing
238 the rental which is payable by said Lessees under said Lease."

Under the facts stated, a case is made for equitable relief, and Complainants are entitled to a decree as prayed.

The following decree was entered:

"This case having been submitted upon the pleadings therein and agreed statement of facts, and now coming on for final decree:

"It is therefore considered, ordered and decreed by the Court that the facts in said case are, and are hereby adjudged to be as the same are set out and found in the opinion of the Court filed in this case on the 7th day of April, 1902.

"It is further considered, ordered and adjudged that under the laws of the State of Georgia, and the decisions of its Courts, shares of railroad stock are mere representations of the railroad property

itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia.

"It is further ordered and adjudged that the said William A. Wright, Comptroller-General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller-General so to do, and he is hereby perpetually enjoined from issuing any execution or taking any steps to collect said taxes upon said shares of stock, and that the
239 said Georgia Railroad and Banking Company is enjoined from making any return of said shares of stock for the purpose of taxation, or from paying any taxes thereon, of doing any act or thing recognizing liability of said shares of stock to be taxed.

"In open Court this 16th day of April, A. D., 1902."

"To the Georgia Railroad and Banking Company:

"A decree having been entered in the above stated case against the Defendants and William A. Wright, Comptroller-General, one of the Defendants desiring to appeal to the Circuit Court of Appeals, you as a co-Defendant therein are hereby respectfully notified to appear and join in the appeal.

"Very respectfully,

J. M. TERRELL,
BOYKIN WRIGHT,
Solicitors for William A. Wright, Compt.-Gen.

"Due and legal service of above notice in writing acknowledged and this Defendant hereby refuses to join in said appeal, being content with the decree rendered in said cause.

GEORGIA RAILROAD AND BANKING COMPANY,
By JACOB PHINIZY, *President.*"

"It appearing to the Court that The Georgia Railroad and Banking Company refuses to join in said appeal: Ordered that De-
240 fendant, W. A. Wright, Comptroller-General, be permitted and he is hereby allowed to make said appeal alone."

"This April 23, '02.

WM. T. NEWMAN,
U. S. Judge."

"It is stipulated by counsel for the several parties in the above stated cause that, whereas, the agreed statement of facts entered into therein is fully set out in the opinion of the Court filed in said cause, in making up the record in said cause on appeal in the Circuit Court of Appeals, the clerk need not copy said agreed statement of facts, but the same as set out in the opinion of the Court shall be taken for such agreed statement of facts and referred to as such.

"This April 23rd, 1902.

BOYKIN WRIGHT,
J. M. TERRELL,
Solicitors for Wright, Comptroller-General, Appellant.
JOS. B. & BRYAN CUMMING,
KING & SPALDING,
Solicitors for Complainant, Appellees."

Lease from The Georgia Railroad and Banking Company to William M. Wadley and his assigns, dated May 7th, 1881, whereby The Georgia Railroad and Banking Company leased for ninety-nine (99) years from April 1st, 1881, to said Wadley and assigns, the following described property under the following stipulations, which
241 are material to the case:

William A. Wright, Comptroller-General, on April 17, 1902, filed petition for appeal to the Circuit Court of Appeals of the Fifth Circuit at New Orleans, which appeal was duly allowed, assigning the following errors:

First. That the Court erred in not sustaining the Defendants' demurrer to the bill, set up by way of answer, and dismissing the said bill, because

(*a*) The Complainants did not make such a case as entitled them in a Court of equity to any relief from or against the Defendants touching the matters contained in said bill, or any of such matters.

(*b*) Because there was no equity in said bill.

(*c*) Because Complainants had no such interest in the matters complained of as to entitle them to maintain said bill, and to entitle them to relief by injunction.

Second. Because the Court erred in granting the injunction against William A. Wright, Comptroller-General, perpetually enjoining him from issuing any execution or taking any steps to collect taxes upon the shares of stock in the Western Railway of Alabama held by The Georgia Railroad and Banking Company in the State of Georgia.

Third. Because the Court erred in granting the injunc-
242 tion against The Georgia Railroad and Banking Company, enjoining it from making any return of the shares of stock in the Western Railway of Alabama held by it, in the State of Georgia, for the purposes of taxation, or from paying any taxes thereon, or doing any act or thing recognizing the liability of said shares of stock to be taxed in the State of Georgia.

Fourth. Because the Court erred in holding and decreeing, under the facts and circumstances of the case, that "under the laws of the State of Georgia, and the decisions of its courts, shares of railroad stock are mere representations of the railroad property itself, and that stock held by a railroad company in railroads without the limits of this State is not taxable in the State of Georgia," and in not holding and decreeing to the contrary.

Fifth. Because the Court erred, under the facts and circumstances of the case, in holding and decreeing "that the said William A. Wright, Comptroller-General, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as Comptroller-General so to do," and in not holding and decreeing to the contrary.

Wherefore, the said William A. Wright prays that the said decree be reversed, and that the said Court be directed to enter a decree dissolving said injunction."

243 Appeal bond, with security in the usual form was approved and filed, and citation issued as follows:

"UNITED STATES OF AMERICA, ss:

The President of the United States to the Louisville & Nashville Railroad Company, and the Atlantic Coast Line Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Western District of Georgia, wherein William A. Wright is Appellant, and you are Appellees, to show cause, if any there be, why the decree rendered against the said Appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness: The Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of April, in the year of our Lord one thousand nine hundred and two.

WM. T. NEWMAN,
U. S. Judge."

The Louisville & Nashville Railroad Company and Atlantic Coast Line Company, Appellees, accepted service through their solicitors.

244 The Georgia Railroad and Banking Company, one of the Defendants in the above stated case, having been notified and requested in writing, by its co-Defendant, William A. Wright, Comptroller-General, to join in the appeal to the Circuit Court of Appeals, which the said Wright has petitioned for, and refusing to do so, being content with said decree, does hereby acknowledge due and legal service of a copy of the within citation, and waives all further service or notice in said appeal.

April 19th, 1902.

THE GEORGIA RAILROAD AND BANKING CO.,
By JACOB PHINIZY, *President.*

On October 13, 1902, judgment was rendered by the Circuit Court of Appeals affirming the judgment of the Circuit Court, and on March 24, 1905, on the petition of William A. Wright, Comptroller-General, *vs.* The Louisville & Nashville Railroad and the Atlantic Coast Line Company as Respondents, a Writ of Certiorari was issued to the Circuit Court of Appeals for the Fifth Circuit commanding the record and proceedings in said case to be sent up to the United States Supreme Court.

24. Opinion of the Court in the foregoing case.

This case comes here on certiorari to the Circuit Court of Appeals, that Court having affirmed *per curiam*, a decree of the Circuit Court enjoining the Comptroller-General of Georgia from collecting a tax for the year 1900. 116 Fed. Rep. 669. 117 Fed. Rep. 1007.

245 In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corpora-

tion, held by The Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter, by the State of Georgia, under its Constitution and statutes. The Defendants in error, the Plaintiffs below, are Lessees of the Georgia corporation and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decisions in Kidd *vs.* Alabama, 188 U. S. 730, the power of the State to tax shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present Constitution and laws.

The Constitution of Georgia provides that "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Code of 1895, No. 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The Constitution further makes void all laws exempting property from taxation other than the property therein enumerated, which does not include this stock. No. 5886. Following these requirements the General
246 Tax Act for 1899 and 1900, Laws of 1898, No. 150, Section 1, 2, p. 22 authorizes a tax on all of the taxable property of the State.

The natural inference from the foregoing language is that the Comptroller-General was bound to collect this tax. It is true that it was said in a case decided before the date of the present Constitution, that stock in railroads outside the State was not taxable in Georgia, the reason offered being that such stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the State in which the road lies. Wright *vs.* Southwestern Railroad, 64 Ga. 783, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the Supreme Court although the passage is cited in the later of the two following cases. Georgia State Building & Loan Association *vs.* Savannah, 109 Ga. 63, 69. Peoples' National Bank *vs.* Cleveland, 117 Ga. 908, 913, 915.

If we look to the construction adopted by the Legislature there is no doubt as to that. The Code, after defining personalty as property movable in its nature, continues "stocks representing shares in an incorporated company holding lands, or a franchise in or
247 over lands, are personalty." Sec. 3070. The Act of 1884-1885, touching returns of property for taxation, No. 457, Sec. 2, p. 30, enacted in terms, "that personal property shall be construed, for purposes of taxation, to include * * * all stocks and securities, whether in corporations within the State or in other States, owned by citizens of this State, unless exempt," etc. It is argued on one side and denied on the other that this section was repealed by the Code, but whether it was or not, it equally may be invoked for the purposes of interpretation at least. We do not understand and can not believe that the Supreme Court of the State would deny the power of the Legislature under the present Constitution to tax stock.

The argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once,

and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations, of which the property is taxed, within the State, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar Constitution forbade taxation of both capital and stock. Burke *vs.* Badlam, 57 Cal., 594, 601. But from the point of view of the tax-payer, it does not
248 matter whether all of his double taxation is done in one State or half in one and half in another. He suffers the same injustice. And as manifestly the clearest right to tax belongs to the State where the railroad has its tracks, every principle of justice and patriotism would require the same abstinence from taxation of stocks of the railroads of neighboring States that is practiced with regard to those of the taxing State, in this case Georgia itself.

The difficulty with this argument is that the Georgia Constitution requires the taxation of all property subject to be taxed in Georgia. And while it may say that the constitutional requirement is sufficiently complied with when the bond and chattels which give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if stock is left untaxed when the lands and chattels can not be reached. Probably the Constitution does not go further than to require one tax on all obtainable sources of value, even if it permits more. Burke *vs.* Badlam, 57 Cal., 4, 601. But it certainly seems intended to tax once at least all property which can be come at in any way. San Francisco *vs.* Fry, 63 Cal., 470. A tax in another State is no tax for the purposes of the State of Georgia. Kidd *vs.* Alabama, 188
249 U. S. 730, 732. Dwight *vs.* Boston, 12 Allen, 316, Seward *vs.* Rising Sun, 79 Indiana 351. Dyer *vs.* Osborne, 11 R. I., 321. McKeen vs. Northampton, 49 Penn St. 519.

Putting the case at the lowest, the above cited section of the Constitution was adopted in the interest of the State as a tax-collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the Constitution, the law of 1898, under which this tax is demanded, contains the following: "In addition to the questions now propounded to tax-payers by the tax-receivers, questions shall be framed by the Comptroller-General to reach all property upon which a tax is imposed by this Act, and especially the following questions * * * Thirtieth—How many shares of stock did you own on the day fixed for the return of property for taxation issued by corporations located without this State? Thirty-first—What was the gross nominal value thereof? Thirty-second—What was the fair market value thereof? Laws of 1898, No. 150, Sec. 16, p. 36." This plainly contemplates that the mandate of the Constitution shall be carried out, and in view of Sections 1, 2, of the same Act, referred to above, and of the facts that Legislation could not make the requirement to tax more explicit, and that the Constitution seems to be regarded by the Supreme Court of the State as self-executing Georgia State Building & Loan Association *vs.* Savannah, 109 Ga., 63, we think it impossible to escape from the words. The distinc-
250 tion intended between stock in corporations of which the property is taxed by the State and that in corporations other-

wise untaxed is emphasized by the thirty-third question: "How many shares of stock did you own * * * issued by corporations within this State, the capital stock of which or the property of which is not returned by such corporation for taxation? We think the distinction consistent with the Constitu-ion if not required by it as held in Burke *vs.* Badlam, cited above. Decree reversed.

25th. William A. Wright, Comptroller-General *vs.* Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company. * * * Whereas lately in the United States Circuit Court of Appeals for the Fifth Circuit in the case of Wm. A. Wright, Appellant, and the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, Appellees, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 13th day of October, A. D., 1902, is in the following words: "This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Georgia and was argued by counsel.

On consideration whereof it is now ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the Appellant Wm. A. Wright, and the surety on the appeal bond herein, Philip Cook, be condemned to pay the costs of this cause in this
251 court for which execution may be issued out of the said Circuit Court.

October 13, 1902."

And whereas in the present term of October in the year of our Lord One Thousand Nine Hundred and Four, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel:

On consideration whereof it is now hereby ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be and the same is hereby reversed with costs, and that the said Appellant, Wm. A. Wright, Comptroller-General, recover against the said Appellees $140.15 for his costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the Circuit Court of the United States for the Northern District of Georgia, with directions to dismiss the bill of complaint.

November 14, 1904.

You therefore are hereby commanded that said execution and further proceedings be had in said cause in conformity with the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had, the said writ of certiorari notwithstanding.

252 Witness: The Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of January, in the year of our Lord, One Thousand Nine Hundred and five.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

It is ordered by the Court that the foregoing mandate be made the judgment of this Court and that Wm. A. Wright, Comptroller-General, do recover from the said Louisville & Nashville Railroad Company and the said Atlanta Coast Line Railroad Company the costs in this behalf expended, to be taxed by the Clerk of the Court.

In open court this January 10, 1905.

WM. T. NEWMAN,
U. S. Judge."

35. Affidavit of Wm. A. Wright, Comptroller-General, as follows: "I am one of the Ddefendants in the above stated cause and at present the Comptroller-General of the State of Georgia, having been such since 1879. Under the laws of Georgia it is the duty of railroad corporations to make their returns for taxation to me as Comptroller-General. It is my duty where returns are made and the same are unsatisfactory, to reject the same and to assess, notifying the railroad company that its returns are unsatisfactory. The officer making such return having the privilege to refer
253 the question of true value, or amount as the case may be, to arbitrators. In case of no return it is my duty to make an assessment from the best information I can procure.

The Complainant in the above stated case for many years has returned its property for taxation claiming that it was liable to the State for taxation only upon a certain per cent. of its net investments, upon property used in the operation of its railroad. This limitation of taxation on its property has not been claimed by the company as applying to its property disconnected with the operation of the road. As to such last named property it is the duty of the company to return the property for taxation as such being subject to ad valorem taxation.

On or about May 25th, 1901, deponent learning for the first time that The Georgia Railroad and Banking Company owned one-half of the stock of the Western Railway of Alabama, a foreign corporation, said stock aggregating fifteen thousand (15,000) shares of the par value of One Million Five Hundred Thousand Dollars, and after an inspection of the returns of Complainant that year for taxation, observing that said shares of stock had not been returned by Complainant for taxation, demanded of Thos. K. Scott, General Manager, a return of said property as other unexempted property. A copy of this letter is hereto attached marked Exhibit "A," to which leave of reference is prayed to this and other exhibits which
254 may hereafter be referred to and incorporated as a part of this affidavit. To this letter on June 6th, 1901, the said Scott as General Manager replied in substance that he knew of no law which required said stock to be returned and requested a citation of the law on this subject; a copy of which letter is hereto attached marked Exhibit B. The Complainant neglected and refused to return its said shares of stock for taxation and sought and obtained of the United States Court for the Northern District of Georgia an injunction which restrained deponent from taking any steps to assess and collect taxes on this property. This issue was litigated in said Court wherein injunction was made permanent, and on ap-

peal from said Court to the Circuit Court of Appeals in New Orleans, the judgment was affirmed. Subsequently proceedings were instituted in the Supreme Court of the United States, by which the record was certioraried from said Circuit Court of Appeals to the said United States Supreme Court, whereupon said United States Supreme Court on November 24, 1904, reversed the decree rendered in said Circuit Court of Appeals and in pursuance of the mandate from said Court the suit was on January 10th, 1905, dismissed in said District Court.

In pursuance of said judgment and decree deponent did on the 27th day of January, 1905, inform Jacob Phinizy, President of the said railroad company, of the result of said litigation and that it became the duty of deponent to assess said property for
255 taxation in the absence of a return and asked for any and all information that he though- proper to give touching the valuation of said stock for taxation. A copy of this letter is hereto attached marked Exhibit C. The several letters of the said Phinizy and of the general counsel of Complainant, to-wit: Jos. B. & Bryan Cumming, are also attached as exhibits with the usual prayer of reference. Suffice it to say the said Georgia Railroad and Banking Company failing and refusing to make a return of this property for taxation, I, as was my duty under the law, assessed the same and from the best information obtainable, said assessment being made and values reached under the following plan, to-wit:

I ascertained the amount of the gross earnings of the Western Railway of Alabama for each year in which the said shares of stock of the Western Railway of Alabama were in default for taxes. I also ascertained the operating expenses of the said road for the same period and deducted the operating expenses from the gross income, except when the operating expenses appeared to include betterments. I then deducted 66 2/3 per cent. of the income as operating expenses, and from that sum deducted the annual interest, charges on the said Western Railway of Alabama, and capitalized the balance at six per cent., thus reaching what I deemed
256 the market value of the shares of stock of the said Western Railway of Alabama, and made my assessment for each year upon this basis of value thus arrived at. Copy of the calculation and assessment is hereto attached marked Exhibit X. On this basis of value the shareholders of the Western Railway of Alabama would receive six per cent. net upon their shares of stock.

Deponent believes the amount thus reached is at least a low market value of the shares of stock and accordingly did on the — day of ——, 190-, issue executions therefor. Deponent expressly denies that the values assessed are excessive or unreasonable, or that it is of a higher value than property of like character is received for taxation in this State, the law requiring that all property shall be returned at its fair market value."

36. With letters attached the material parts of which are as follows:

Letter dated, Atlanta, January 27th, 1905, from W. A. Wright, Comptroller-General, to Jacob Phinizy, President, The Georgia Rail-

road and Banking Company: "The Supreme Court of the United States having recently held, as you doubtless are aware, that the shares of stock of the Western Railway of Alabama owned by the Georgia Railroad and Banking Company are taxable in
257 Georgia, it becomes my duty to assess these shares of stock for taxation for each of the years in which they are in default for their taxes. This assessment is required to be made by the Comptroller-General from 'the best information obtainable.'

I desire to proceed to the discharge of this duty intelligently and therefore respectfully request you to furnish me any data in your possession which will enable me to make perfectly fair, just and legal assessments of this property. From your long connection with the property as President of The Georgia Railroad and Banking Company, and your familiarity with its value, you doubtless are in possession of information which will very greatly aid me in making an equitable assessment of the property.

I trust therefore you will submit at your earliest possible convenience any facts or suggestions bearing upon this line which you may deem proper. I would be glad to have any data which you may submit with reference to its value for each year beginning with the year 1883, the year I am informed your corporation became the owner of these shares of stock. I expect to proceed with this matter some time the early part of next week if possible."

Jacob Phinizy, President, to Wm. A. Wright, Comptroller-General, dated January 28, 1905:

"Your favor of the 27th inst received. I will confer with the attorney of the Lessees of The Georgia Railroad and Banking
258 Company, Major Jos. B. Cumming, on Monday and let you hear from me later in regard to the value of the shares of stock of the Western Railway of Alabama held by The Georgia Railroad and Banking Company, which have recently been declared subject to taxation by the United States Supreme Court."

Phinizy, President, to Wright, Comptroller-General, January 30th, 1905:

"After conference with Major Jos. B. Cumming, who is attorney for The Georgia Railroad and Banking Company as well as the Lessee Company, I write to say that I have requested him to give you all the desired information concerning the value of the Western Railway of Alabama stock, as requested in your favor of several days ago. Major Cumming is just as familiar with the value of this stock as I am, and will no doubt be able to satisfy you in every way."

Phinizy, President, to Wright, Comptroller-General, February 10th, 1905:

"I have your letter of February 9th inst. informing that you have assessed Fifteen Thousand shares of stock of the Western Railway of Alabama for taxation for each of the years from 1883 to 1904, both inclusive, and enclosing a statement showing the tax assessed for each of said years.

Your letter also asks for a check for the amount of said
259 taxes together with interest at the rate of 7 per cent. per annum on taxes due for each of the years 1883 to 1904, both

inclusive, computed from December 20th, of each year to date of settlement.

In a matter of this importance and until recently wholly unexpected, I feel assured that you will see the justice of allowing a reasonable time for the submission of the details of your demand to counsel. I shall seek at once the advice of counsel, and doubtless I shall be in a position to give a specific answer to your demand in the course of the ensuing week. I can not doubt that you will consider this slight delay as altogether reasonable and permissible."

Phinizy, President, to Wright, Comptroller-General, February 18th, 1905:

"Referring to my letter to you of February 9th inst., I would say:

Your request for a check for $125,974.00 plus interest, as per your letter of February 10th, for taxes, alleged to be due by The Georgia Railroad and Banking Company on 15,000 shares of stock of the Western Railway of Alabama, is respectfully declined.

Besides other grounds, which need not now be stated, for believing that no such amount, if any, is due by The Georgia Railroad and Banking Company on account of said taxes, I beg to state respectfully that the valuation you have put on the stock
260 is, in any view of it, grossly excessive."

Jos. B. & Bryan Cumming, general counsel to Wright, Comptroller-General, January 28, 1905:

"We have this morning your courteous letter of yesterday, relating to the taxation of shares of stock of the Western Railway of Alabama held by The Georgia Railroad and Banking Company and enclosing a copy of your letter to Mr. Jacob Phinizy, President of that corporation.

We write now merely to acknowledge receipt. A fuller answer will be given by Mr. Phinizy, or ourselves, which will probably reach you by Tuesday morning of next week, and not later than Wednesday."

Jos. B. Cumming, General counsel, to Comptroller-General Wright, February 1st, 1905:

"I have been unexpectedly delayed in giving a further answer to your letter of January 27th. The delay has been due in part to the making up of certain statements, which I shall forward to you with my letter at large either tomorrow or the next day."

J. B. Cumming, general counsel, to Wright, Comptroller-General, February 4, 1905:

"I send you herewith a letter dated January 30th, and which owing to delay in getting some information, I did not complete until this morning.

I send with the letter a statement of dividends received by
261 the Lessees of The Georgia Railroad on the stock in question.

You will, of course, note the fact that these dividends would have been reduced by the amount of taxes, if any, which might have been collected on the shares for the years which the dividends were paid."

J. B. Cumming, attorney Georgia Railroad and Banking Company, to Wright, Comptroller-General, January 30th, 1905:

"Mr. Jacob Phinizy, President of The Georgia Railroad and Banking Company, has referred to me your letter of January 27th inst., and I proceed to answer that letter and one of the same date from yourself to Jos. B. & Bryan Cumming. The Georgia Railroad and Banking Company as well as myself personally will very cheerfully give you any information in our possession or accessible to us, relating to the shares of the Western Railway of Alabama, about which you make inquiry.

The specific inquiry in your letter to President Phinizy is directed to the question of the value of the stock. A statement of the income from the Western Railway of Alabama in those years since
262 1883, in which it has yielded any income to its owners or Lessees, will be furnished you in the course of this communication. It may be well, however, to precede that statement with a concise history of this property, which will make its value—and especially its value as a holding of The Georgia Railroad and Banking Company—better understood.

Under authority of the Act of the Georgia Legislature of February 27, 1875, The Georgia Railroad and Banking Company and The Central Railroad and Banking Company of Georgia purchased the Western Railroad of Alabama at judicial sale. The Act authorized the purchasers of the property either to "hold the title to the same under their existing corporate capacities" *of* to "acquire and hold stock in the present Western Railroad Company of Alabama or any new corporation," etc.

The purchasers elected to hold the property under the first alternative, and they did in fact hold it for several years under a deed made to them as tenants in common. While it was so held, to-wit: May 7th, 1881, The Georgia Railroad and Banking Company assigned all its interest as a tenant in common of one-half to William M. Wadley and his assigns by a Deed of Lease for 99 years, and in the same instrument took back from the said Wadley an obligation of himself and his assigns to return the property at the end
263 of the Lease.

Subsequently, to-wit: In October, 1882, The Georgia Railroad and Banking Company agreed with its co-tenant The Central Railroad and Banking Company of Georgia to incorporate themselves as the Western Railway of Alabama, provided the Lessee of the former would consent. This consent having been obtained, incorporation was accepted with a capital stock of $2,000,000.00, which was afterwards increased, to-wit: April, 1883, to $3,000,000. Of this stock $1,500,000 was put in the name of The Georgia Railroad and Banking Company; but inasmuch as that corporation has two years previously assigned to William M. Wadley and his assigns, for a period of 99 years, "all rights of ownership, management, control and use of the Western Railroad of Alabama, which it (The Georgia Railroad and Banking Company) had or was entitled to," it immediately gave to Wadley's assigns an irrevocable power of attorney to vote said stock—so that the Georgia Railroad and Banking Company, in receiving said shares, received nothing except the evidence of its right to a return of the property at the end of 97 years—nothing of any other value whatever, for income or for con-

trol, nothing which had any value to a purchaser or to a pledgee—nothing which by any conceivable device it could sell or from which it could derive a dollar of income—something which no one would buy for 97 years, for the reason that the income derivable from it and the control accompanying it had been already disposed
264 of for that period. The stock, therefore, has no value, except such value as it may have as a reversion falling in 75 years hence.

2. These shares appear, and have for several years appeared on the annual statement of The Georgia Railroad and Banking Company as follows:—

"15,000 shares Western Railway of Alabama, 900,000.00; income belongs to Lessee."

The significance of the figures "900,000.00" ($900,000) is that they indicate the fact that the actual cost of this half interest to The Georgia Railroad and Banking Company was $902,086.11, from which sum said company charged off the off sum $2,086.11.

3. The Georgia Railroad and Banking Company does not receive any income in the way of dividends or rent from the Western Railway of Alabama; but its Lessees have received since April 1, 1881, by virtue of the Lease aforesaid, and *not* by reason of the issue or the holding of any shares of stock, the net income of said half interest as shown by the statement hereunto annexed.

The foregoing I think embraces all the information, which you ask for in your letters referred to in the first part of this communication. While this information is given freely and cheerfully, I would respectfully protest for The Georgia Railroad and Banking Company.

1. The *the* 15,000 shares of the stock of The Western Railway of Alabama, heretofore standing in the name of The Georgia
265 Railroad and Banking Company, have no taxable value beyond the value of the reversionary interest of said last named corporation in said stock.

2. That if there is any liability whatever of The Georgia Railroad and Banking Company for taxes on said stock, such liability does not extend back to the year 1883.

3. That there is no machinery provided by law for the assessment by the Comptroller General after the lapse of a calendar year of property omitted from a return under the honest, *bona fide* belief that the property is not taxable—the power given to the Comptroller General to assess after the year being conferred only in cases where no return at all has been made."

Jos. B. Cumming, General Counsel to Wright, Comptroller General, February 2, 1905:

Your telegram this date see my letter to you of yesterday explaining delay and promising early reply."

J. B. & Bryan Cumming, General Counsel, to Wright, Comptroller General, February 10th, 1905:

"We thank you for a copy of your letter of yeatersay to President Jacob Phinizy of The Georgia Railroad and Banking Company, and of the statement accompanying it, enclosed in your letter of yesterday."

Letter from Wm. A. Wright to T. K. Scott as follows: "I have just learned that the Georgia Railroad owns one-half of the stock of the Western Railroad of Alabama, amounting to 15,000 shares,
266 par value $1,500,000. If this is true, then the said stock is taxable under the laws of this State, and should be returned as the other unexempted property of the Georgia R. R. is required to be returned. You will therefore please do me the kindness to advise me if the facts as stated above are correct and why the property has not been included in your return made for this year."

Letter from Thomas K. Scott to W. A. Wright as follows: "Your letter of May 25th arrived in my absence.

The shares of The Western Railway of Alabama have not been returned for taxation because I know of no law requiring them to be so returned. If you will cite me to such a law, I will as soon as possible look into the matter and advise you further.

37th. Affidavit of Jos. M. Terrell that: "I was on the 25th day of May, 1901, Attorney General of the State of Georgia, which office I had held from November 1st, 1892. That on or about said 25th day of May, 1901, I learned for the first time that the Complainant in the above stated cause was the owner of fifteen thousand shares of stock in the Western Railway of Alabama, that this knowledge was acquired in this way: Hon. Wm. A. Wright, Comptroller General of the State of Georgia, stated that he had just learned that Complainant owned said stock and submitted the question to me as Attorney General whether said stock was subject to taxation, and after investigating the same I gave it as my opinion that such
267 stock was subject to ad valorem taxation, as other property, in this State."

38. Affidavit of William A. Wright: That he is the Comptroller General and was present in court on yesterday and heard read the return of The Georgia Railroad and Banking Company for the year 1889, and a letter attached thereto, dated May 4, 1889, written by C. G. Goodrich, with a notation at the bottom, "See Annual Report to Stockholders, page 4." Deponent says that the only subject matter of the correspondence in question related to the matter of The Georgia Railroad and Banking Company's return as to cash on deposit, and in no wise called deponent's attention to the matter of stock held in any foreign corporations. Deponent knows he never saw the said report and had no occasion to look to it to find said stockholders, and did not as a matter of fact look at said report at page 4, or any other portion thereof, being satisfied with the letter itself as to cash on deposit and the return in question also being as to the Georgia Railroad income without reference to its property.

Deponent further swears that he has not applied in this litigation for affidavits from any of the Tax Collectors or Tax Receivers of the State, except those of Fulton and Richmond Counties."

39. Affidavit of Charles S. Bohler, of April 24th, 1905: "That I have made an effort to collect all taxes that appear upon the digest and I have placed thereon all parties in default who have failed or refused to return taxes, to the best of my knowledge. I am
268 now endeavoring to ascertain, and shall place upon the digest for this year and former years, the owners of all foreign

stocks, bonds and debentures that I am informed of or can ascertain, and shall continue to place upon the digest and endeavor to collect taxes upon all such that I can get evidence of being owned by residents of Richmond County."

40. Affidavit of A. P. Stewart dated April 26, 1905, as follows: "I have made an effort to collect all taxes that appear upon the digest, and I have placed thereon all parties in default who have failed or refused to return taxes, to the best of my knowledge, am now endeavoring to ascertain and shall place upon the digest for this year and former years, the owners of all foreign stocks, bonds, and debentures that I am informed of or can ascertain, and shall continue to place all such that I can get evidence of being owned by the residents of Fulton County."

41. Affidavit of W. J. Steed, dated April 24, 1905, as follows: "I have carried out the instructions of the Comptroller General and propounded the questions therein stated to each taxpayer, including question No. 18, to-wit 'What is the fair market value of all stocks and bonds owned by you, including debentures, municipal and corporation bonds, in home or foreign corporations, whether held in your own hands or on deposit within or without this State.' I have propounded this question for years past, and have endeavored, as far as I have been able, to ascertain the owners of foreign stock.
269 I am now seeking to ascertain the holders of stocks, bonds and debentures in foreign corporations, and will place them upon the digest when discovered and for as many years back as I may ascertain."

42. Affidavit of T. M. Armistead, dated April 26, 1905, as follows: "That for — years he has been Tax Receiver of Fulton County. He has sought to induce the return of all property covered by questions furnished by Comptroller General. Deponent has never relieved nor intended to relieve from returning taxes the holders of foreign stocks, but has sought to induce all tax payers to return all property subject to taxes."

43. Affidavit of William A. Wright, dated April 26th, 1905, as follows: "That since the lease of The Georgia Railroad and Banking Company to William M. Wadley *et al.*, while the returns have been nominally made out in the name of the President of The Georgia Railroad and Banking Company, the real parties with whom he, as Comptroller General, dealt in all matters affecting the returns and valuations of the property, with the exception of formal correspondence, such as that attached to affiant's affidavit, of file in this case have been Major Green and Thomas K. Scott, respectively, the General Managers of The Georgia Railroad and Banking Company's property, and the taxes were paid by the said General Managers and no protest was ever made to the Comptroller General on the part of said General Managers when communicated with on the subject of
270 their returns that they were not the proper parties to be dealt with in these matters. Deponent has discussed the matter of the tax with the General Manager and subsequently had the President of the Georgia Railroad and Banking Company to make return in pursuance of such discussion. Mr. Scott, the General Manager, discussed with deponent the question of franchise taxes for The Georgia

Railroad and Banking Company, which were taxes peculiarly connected with the corporation itself. Blanks for the return of taxes were mailed to Mr. Scott from the office of deponent, and the same blanks were returned to deponent's office filled out and sworn to by Mr. Jacob Phinizy, as President of The Georgia Railroad and Banking Company. Both Mr. Green and Mr. Thomas K. Scott, up to and during 1901, acted for both the Lessees and the Georgia Railroad and Banking Company, in matters involving taxes upon property of the Georgia Railroad and Banking Company.

271 44. WILLIAM A. WRIGHT, testified for the defendants by affidavit substantially as follows:

I was elected Comptroller General of the State of Georgia in 1879 and have continuously held the office for twenty-six years. As such officer, I am the head of the taxing department of the State and it is my duty each year to issue instructions to the tax receivers of this State for their guidance in receiving the returns of all property in this State subject to taxation, and which under the law is returnable, to these officers. The digests of the taxing officers of the several counties of this State, are finally returned to this office and here deposited. These digests contain property returned for taxation in the several counties of the State, while there is a class of property, and among the class railroad property, which is required to be primarily returned to this office—the office of the Comptroller General—for taxation. In this way, and on account of my long occupancy of the office of Comptroller General, I have become familiar with the property values of this State.

The instructions which I yearly send out, and above referred to, contain a summary of the laws relative to taxation and the duty of the receivers, and the purpose of these instructions is to put in succinct form the law for the benefit of the receivers either quoting law, or by reference to the sections of the Code. Attention

272 has been invariably called to the tax receiver as to the oath which the taxpayer is to take, and the further fact is stressed that it is the duty of the tax receiver to have the taxpayer take the oath as provided in Section 834 of the Code, which oath is as follows:

"I do solemnly swear that I have carefully read (or have heard read) and have duly considered the questions propounded in the foregoing tax list, and that the value placed by me on the property returned, as shown by said list, is at the true market value thereof; and I further swear that I returned, for the purposes of being taxed thereon, every species of property that I own in my own right, or, have control of, either as agent, executor, administrator, or otherwise; and that in making said return, for the purpose of being taxed thereon, I have not attempted, either by transferring my property to another or by any other means, sought to evade the laws governing taxation in this State. I do further swear that in making said return I have done so by estimating the true worth and value of every species of property contained therein."

I have, invariably stressed and emphasized the fact that it is the duty of the tax receivers to see that all property returned to them was returned at its true and full market value and wherever the

law made it my duty as Comptroller General to receive the return of property I have adopted the rule of law on the subject of requiring that it be returned at its true market value. This is the law of the State as I understand it, and the practice so far as I know and am advised.

The claim is often made by the taxpayer that there are other taxpayers who do not return their property at its true market value, and that they should not be required to return theirs at its
273 true market value, but this claim has its foundation in sporadic abuses of the law and not by virtue of the law, nor by its partial administration. If the practice exists in any of the jurisdictions of this State wherein property is confessedly returned at two-thirds of its value it is not in consequence of the law, nor of any instructions which I have given, but in spite of both.

In assessing the stock of the Western Railway of Alabama held by the Georgia Railroad & Banking Company, and the Central of Georgia Railway Co., I have done so prompted by the same rule of law which has directed and controlled me in the assessment of all railroad property. The assessments of value for the several years made on this stock was made from the best information I could procure as to its value, and was made by me for the reason that the Railroad Companies neglected and refused to return the property for taxation. These assessments were made in pursuance of official duty and there was no purpose to place an excess of valuation on these shares of stock, nor do I believe that the valuations I have placed thereon are in excess of their true market value.

To compare the valuation and assessment of foreign railroad stocks held here with the valuation of the physical properties of railroads located in this State, is misleading. It would necessarily result in an erroneous conclusion and can furnish no basis for determining whether the stocks in question are fairly or unfairly assessed.
274 The taxing officers in the nature of things, cannot have the physical properties of foreign railroads under observation while in this State the contrary is true. Then this particular stock occupies a peculiar situation even as compared with other stock; it is owned entirely by two owners—two partners you may say,—in operating the W. of Ala.

The stock is not dealt with on the market, and its value cannot be ascertained by the buying and selling price.

Again, dividends cannot be entirely relied on as a test of value. Otherwise, in those years when there is no dividend the stock ought to be returned as having no value, which would be as erroneous as returning a railroad which is not earning net profits as of no value for taxation.

Again, the two partners operating this road might if they choose use the profits in any way they please, declaring no dividends as such; they might use the profits in building extensions or in permanent improvements.

To make comparison that would be of value, you would have to inquire if these shares were treated differently from other foreign shares.—I will say on this point that, I adopted the only method I could devise for reaching what these shares were worth—a method

which a proposed purchaser would adopt if he were making inquiry as to their value. I further checked the result of this method by what I learned the owners paid for the property, 25 or 30 years ago
275 when it was by no means so valuable, viz., three millions of dollars and more.

I tried to be cautious and conservative, and asked the railroad companies to give me any information they had, and they did give it, and I considered it all, and finally reached the conclusion I did with the best information as to this particular property that I could procure."

46. PAUL D. LANGDON testified by affidavit for the defendants substantially as follows:

That he is a dealer in stocks and bonds and familiar with the financial statements and values of railroad stocks and securities in this vicinity, and especially of those of the Western Railway of Alabama. Said shares are not sold in the market, being owned one-half by the Georgia Railroad and Banking Co. and one half by the Central of Georgia Railroad Company, and hence their value is ascertainable only by an analysis of the financial statements of the company, and the physical condition of the railroad property, and its strategic position. The Western Railway of Alabama is now a part of a through system from the North to New Orleans. Deponent has examined the financial statements of the gross and net earnings, operating expenses, etc., of said company from the year 1895 to 1905, both inclusive. After a careful analysis of the financial statements of each of said years, I would say that the following would be a most conservative estimate of the value of the stock, to-wit: 1895, $60.00 per share; 1896, $60.00; 1897, $80.00; 1898, $75.00;
276 1899, and 1900, $90.00 each; 1900, and 1901, $100.00; 1902, 1903, 1904 and 1905, $110.00.

For ten years past, average net earnings have been a trifle over 80%, which upon 6% *per cent.* valuation would have made the stock on an average, for the above years, $133.00 per share. But I have allowed 3% for betterments and depreciation, which I deem a liberal sum, making a clear net average of 5% on which my figures above are based.

47. The following opinion of Honorable John C. Hart, Attorney General, bearing date August 25th, 1904, was introduced in evidence by the defendant, the material portions of which are as follows:

I am in receipt of your inquiry of even date in which you request an official ruling whether arbitrators selected to settle the question of value of property to be returned for taxation have the right to fix the value confessedly at fifty per cent. of its fair market value, based upon the contention that other individual or corporate tax payers have in certain instances returned their property at half of its value. This inquiry, as I understand, has been provoked on account of certain differences arising between a cotton mill or mills in the city of Augusta and the tax receiver of Richmond County.

On a former occasion this identical question was raised by the railroad companies doing business in this State, their conten-
277 tion being that they should be assessed only fifty per cent. for the reason that individual tax payers paid taxes on their

property at that rate. My official opinion was then, and it is now, that arbitrators have no right to fix the value at any such figure, but that the law prescribes the rule by which property should be returned for taxation, viz., "at its fair market value." All property in this State, both corporate and individual should be returned, and if not returned, assessed in the light of this rule. I do not understand how there can be any question about the proposition. The section of the Code in plain language requires that the tax payer shall return his property at its fair market value. The oath prescribed for the taxpayer recites that he has returned it at its true market value, and it surpasses my comprehension how any tax payer can confessedly return his property at half of its value, and insist that he can conscientiously take the oath that it is its fair value, or its true market value. It must be confessed that there is property, corporate and individual, returned for taxation in Georgia, at its true market value, some of it at half of its market value, and there is doubtless a large per cent. not returned at all, and a taxpayer could insist with as much propriety, since there is some property not returned in Georgia at all, that he should not be taxed, as to insist, because there is some other property returned at half of its value, his must be returned at the same rate. The remedy is, in order to equalize taxation, to
278 force the man up who is not bearing his part of the burdens of government and not drag the citizen down to his level who is willing to bear his, or at least is unwilling to shirk it by making a false return.

The correct rule, therefore, is, that all property should be returned at its fair market value, because, first, the law requires this, and secondly, in its enforcement the expenses of government and maintenance of law so essential to the preservation of property, is equally and justly distributed."

48. WILLIAM A. WRIGHT, sworn for the defendants:

I am the Comptroller General of the State. The law requires that all railroad properties be returned to the Comptroller under oath with the items specialized; the return shall state the value of the property under oath. The returns are sworn to by the officers in control of the property, and forwarded to the Comptroller each year by the first of May. The Comptroller is required upon the receipt of the returns to examine them and if he finds any items of property embraced in the return put at a valuation lower than he considers its market value he is required to assess the different items of property to which he urges objection on account of their lower valuation. When I make my assessment on any item of property to which I raise objection, I am required to do it from the best information I can obtain. The law does not fix any basis except its market value. When I make an assessment in such cases, the railroad is allowed twenty days upon notice of my assessment to determine whether it will arbitrate and submit my assessment to a board of arbi-
279 trators. The law requires that the Comptroller shall appoint one of the Railroad Commissioners as arbitrator on the part of the State, the railroad is allowed to appoint an arbitrator on its behalf. If these two are unable to agree upon a valuation, they are required within thirty days to select an umpire. If they fail to se-

lect an umpire within thirty days the Governor is required to select two arbitrators.

I heard the evidence of Mr. Smith and Mr. Hammond relative to my appearance before the board that arbitrated the Seaboard Air Line and Central property, and their reference to the statement of mine in which they stated that I had advised that 33⅓% of the value of the road should be deducted prior to the levying of the assessment. In other words, that railroad property was not to be returned for taxation in Georgia at more than 66⅔% of its value. I would say that I stated substantially what was taken down by the stenographer in the Seaboard Airline case. I have at different times appeared before these boards or arbitration, of course frecquently, and can only state in a general way what has been my suggestion to the board in passing upon this property and giving them some idea of how I reached my assessment. It was purely voluntary upon my part. The law does not require me to appear before a board of arbitrators—notwithstanding my distinguished friend, Mr. Wright, that it was my duty to do so. When I have made up my assessment as the law directs and the matter is turned over to the board of arbitra-
280 tors my connection with it officially ends. I did not advise any board of arbitration after reaching the true market value to reduce it 33⅓% and tax it at ⅔ of its value; for the reason that it was at that value that all other property was assessed in Georgia. I invoke the recollection of some of the gentlemen who were connected with the arbitration board in 1903, when I appeared before the board. My recollection is that Mr. Alex. Smith was on the board himself, in the case of the Central when the assessment of its franchises under the new law was first up before the board, and I certainly would not have stated that it was to be returned at ⅔ of its market value. Mr. Smith and Mr. Hammond doubtless got the ⅔ idea from Col. Lawton and other gentlemen, who were insisting that that was the value their property ought to be returned at, and that I stated to these gentlemen in my assessments growning out of the conflicting opinions of myself and the railroad authorities as to what was a proper basis upon which to assess railroad property. Some of these gentlemen thought it ought to be based on the market value of the stock, or the market value of the bonds to ascertain what was the value of the property. Others contended that it ought to be based on the net earnings of the stock as shown by the Railroad Commission. Others that it ought to be based on the returns made to me under the franchise law, taking into consideration all of these things, as to the value of the stock, bonds, the operating expenses, the gross income and the net income. Among all these conflicting opinions I tried to reach what I thought was a fair market value of the
281 property; and taking all these methods into consideration, it was my purpose always to do the roads absolute justice. I will add further that they contended frequently that my capitalization of the net earnings on the 6% basis was entirely too low. I think that Col. Lawton will remember that in his case he thought 7% or 8% was low enough. With all these things to harmonize I did my best, taking everything into consideration to arrive at what

I thought was a fair market value, and I made arbitrary reductions several times, varying from 30% to less. The railroads were required to swear that they returned their property at its full market value. I have stated, and I repeat that in making the reductions I spoke of, I made them for the purpose of getting at the true market value and not for the purpose of getting at ⅔ of the market value.

Cross-examination:

That is the only purpose for which I have ever taken off this ⅓; it has never been my practice to assess it otherwise in the State of Georgia. I remember all about the letters of July 25, Aug. 14, 1905 addressed to Mr. Forrest Adair Vice President of The Atlanta Water & Electric Power Company. The letters shown me are those written by me to him. I will state the circumstances that lead up to the writing of these letters. Mr. Adair made no return to me of the value of his franchise. He gave as the basis of his assessment what purported to be gross earnings, operating expenses, net earnings of the company for the first three months of its operation.

282 That disclosed a very large earning power, and based upon a capitalization of the net earnings at 6% would have put a very heavy burden upon the property. In a personal interview with Mr. Adair and Mr. Spalding, who was attorney for the company, I told Mr. Adair that I could not do otherwise than use these figures in making the assessment upon 6% capitalization of the earnings, which would make the value seemingly very excessive. They said to me this was a new property that has hardly been installed. Since we made the returns we have had bad luck; we were imposed upon by people who furnished us machinery. We had a great blow out and tore up a whole lot of our property, and have had to spend a great amount of money for repairs, etc. We think you ought to take into consideration these facts following the first three months' service of the company in fixing your valuation." Based upon his contention, and with the desire to do the company no injustice, and to tax them at what the law required, at something like their market value, I agree to a reduction of 33⅓%. I think perhaps I should have stated in that letter that it was done with that end in view; but those are the facts; that it was done with the desire to do this company no injustice; I assessed their franchise at the figures stated in the letter—$424,000 in round numbers. I capitalized $60,000, net earnings on a basis of 6% and reduced the assessment ⅓. I did it upon the idea that we wanted to get at the market value and did not want to do these people any injustice. In view of what I have

283 stated in these letters, that the value of the property was a million dollars, and that I proposed to assess it on a basis of $60,000 net income, and reduce the assessment ⅓ I might have unintentionally created a different impression; but I state that it has always been done on the idea of reaching the market value of the property. When I have reached the market value of railroad property I have not always made a practice of reducing it one-third. I reduce it arbitrarily—not necessarily on a 33⅓ basis. Not substantially that

Almost all assessments of railroad property have resulted from

awards of boards. In 1903 we had an entire reorganization of the tax system growing out of the franchise tax act. If you will examine those returns, you will find that these assessments are not the assessments of the Comptroller, but are the awards of the arbitrators—that is for 1903. The purpose was to try to equalize the returns, and the boards have fixed the values. They sometimes reduced my assessments as much as 80%; some instances 40% and 50%. My assessments would necessarily be the full market value, and in a great many instances it was beyond the market value. Boards of Arbitration have reduced my assessments from 75% to 80%, and it is natural to belief they thought my assessment was largely in excess of the market value. As to the 80% I am referring to two or three cases, not to the average. I have here two or three cases where my assessments were reduced 80%. The Comptroller's assess-
284 ment upon the franchise of the Southern Railway was $6,581,297., while the arbitrators valued it at $1,650,600. That was only on the franchise. I assessed the Alabama Great Southern at $288,000.; the arbitrators $43,740. I assessed the Atlantic Coast Line at $4,632,000; the arbitrators valued it at $2,464,640. The Atlantic & West Point assessment by the Comptroller was $1,615,800; the arbitrators value was $486,440. I assessed the Central franchise at $5,500,000; the arbitrators value was $2,830,237. In these cases the franchise alone is referred to and do not cover the tangible property. I have always taken the position in getting at the value of the franchise that the sum of the value of the tangible property and the franchise was equal to the value of the whole property. It is not true that the result of these assessments in almost every case was that 1/3 has been deducted from what I considered was a fair market value by the board. They did not consider a fair market value what I considered it. They did not sustain my assessments. I was obliged to make my assessments upon the basis of the full market value of the property.

Q. And they deducted 1/3?

A. I think they did. I think that was the custom.

I have never denied the correctness of the report of my statement before the Central board of arbitrators in 1905, which was introduced here. It is possible I used that language as there stated. As you doubtless know, I am not accustomed to talking like lawyers to juries
and all that sort of thing, and I may not have been par-
285 ticular enough in the language I used to convey the idea.

There was no purpose to conceal anything, or do anything that was not upon the line I have indicated. From my reference to the opinion of Mr. Boykin Wright, Attorney General, I did not mean that even in matters where the Atto-ney General advised me I deemed it to be my duty to set up my opinion of the law as against his. I very frequently differ with lawyers, some others as well as the Attorney General. When the Attorney General advised me to do anything that it was my duty to do and supported it with law then I acted upon it; but when he merely gave it as an official opinion not supported by law, I did not. Whenever he simply gives his opinion unsupported by law, my opinion is as good as his.

Redirect:

In assessing railroad property my purpose was never to make any discrimination. I have tried all my life to be just and fair to everybody, and did the best I could to carry out the law. I may have made some mistakes sometimes, like most people; I don't claim to be infallible. In assessing other corporations, or accepting their returns I did not make any discrimination. I think every gentleman who has been connected with the railroads in Georgia will do me the courtesy to say that.

I have never given instructions to Tax Receivers and Tax Collectors or authorized or attempted to authorize any of them to
286 make any discrimination, and if there ever was a case where the Comptroller might be moved to do other than as the law and what he believed his duty required, it would have been in the case of Col. Lawton's railroad and Maj. Cumming's railroad. In all instructions I have given to the Tax Receivers, Tax Collectors, or tax officers, I have tried to mete out absolute and equal justice to everybody at all times. If I have not done so it has been because I did not know how to do it. After I made my assessments and the arbitrators have been appointed, they then arbitrated on the property; I never undertook — them what to do. I answered inquiries as to how I reached my conclusions as to values, and how I assessed these properties, and I took the market value of the stocks and bonds so far as I was able to obtain them, getting all the information I could to arrive at the value.

JOHN C. HART, *Att'y Gen'l*,
BOYKIN WRIGHT,
Counsel for Defendants.

JOS. B. & BRYAN CUMMING,
J. R. LAMAR,
SANDERS McDANIEL,
ALEX. C. KING,
Plaintiff's Att'ys.

287 (*Order.*)

The foregoing is hereby approved and ordered filed as a Brief of the Material portions of the evidence in said case and is made a part of the record therein.

This February 2nd, 1906.

J. T. PENDLETON,
Judge S. C., A. C.

Filed in office this the 2nd day of February, 1906.

T. H. JEFFRIES,
Deputy Clerk.

STATE OF GEORGIA,
County of Fulton, City of Atlanta:

I hereby certify, That the foregoing pages hereunto attached contain a true and complete transcript of such parts of the Record as are specified in the Bill of Exceptions and required, by the order of

the Presiding Judge, to be sent to the Supreme Court in the
288 case of Georgia Railroad & Banking Company, plaintiff in Error *vs.* William A. Wright, Comptroller General, *et al.*, Defendant in Error.

I further certify, That the — Term of said Court, at which said case was tried, adjourned ——, 1900. All of which appears from the Records of said Court.

Witness, My signature and the seal of said Court, this the 17th day of Febr'y 1906.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Ga.

Filed in Office Feb. 17, 1906.
LOGAN BLECKLEY,
D. C. S. C., Ga.

289 47 Atlanta, March Term, 1906. Cobb, 2.

GEORGIA RAILROAD AND BANKING COMPANY
v.
WRIGHT, Comptroller-General, ET AL.

By the COURT:

1. The present constitution imperatively requires that all property of every nature whatsoever within the territorial limits of the State shall be taxed, except such as the constitution expressly authorizes the General Assembly to exempt from taxation.

2. The constitution does not require any property to be taxed more than once.

3. A tax law will not be so construed as to require the same property to be taxed a second time, unless such a construction is required by the express terms of the statute or by necessary implication.

4. When a tax is imposed upon that which has inherent value in the hands of one person, and is also imposed upon that which is a mere symbol thereof in the hands of another person, deriving its value solely from that which it represents, the same property
290 is twice taxed.

5. When a tax is levied against a corporation upon all its property, and a tax is also levied upon the value of the shares in the hands of the stockholders, that which makes up the value of the property of the corporation and the value of the shares of the stockholders is one and the same thing, and under such a system of taxation the same property is twice taxed.

6. By the act of 1885 (Acts 1884-5, p. 30) shares of stock in corporations within the State were declared to be the subject of taxation.

7. By the act of 1886 (Acts 1886, p. 24) the act of 1885 above referred to was repealed, so far as it related to stock in corporations in this State which were required by law to make a return of property for taxation to the comptroller-general.

8. By the act of 1888 (Acts 1888, p. 29) the act of 1885, so far as it related to the taxation of shares of stock of corporations within

this State, was repealed as to shares of stock in those corporations where the law required the president of the company to return
291 the property of the corporation for taxation.

9. The provisions in the tax acts of 1886 and 1888 which in effect declare that shares of stock in domestic corporations need not be returned for the purpose of taxation have been carried forward in every tax act which has been passed up to the present time, and were not repealed by the adoption of the code of 1895. There is no law now of force in this State, nor has there been since 1888, requiring shares of stock in corporations within the State to be returned for taxation when the president or other officer of the company is required by law to return the property of the corporation, either to the comptroller-general or the tax-receiver of the county.

10. The General Assembly not being required by the constitution to impose a tax on shares of stock in domestic corporations where the property of such corporations is taxed in the hands of the company, the failure of the General Assembly to impose such a tax, while imposing a tax upon shares in foreign corporations, is not, as to the owners of shares of the latter class, a violation of those provisions of the constitution of Georgia which require that protection to property shall be impartial and complete, and that all taxation shall be uniform upon the same class of subjects and ad valorem on all
292 property subject to be taxed within the territorial limits of the taxing authority, nor of that provision of the fourteenth amendment to the constitution of the United States which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

11. "A tax in another State is no tax for the purposes of the State of Georgia."

12. That provision in the constitution of the State which declares that protection to persons and property shall be impartial and complete is the equivalent of a declaration that no person shall be denied the equal protection of the laws.

13. The first section of the fourteenth amendment to the constitution of the United States places a limitation upon all the powers of a State, including among others, that of taxation.

14. The limitations in the fourteenth amendment are upon the State and those who act in its name and under its authority, and has no reference to actions by individuals.

15. The courts of this State will take judicial notice that
293 the mass of property in this State is made up of lands and the different forms of personalty, but such notice can not be taken as to the quantity of personalty.

16. When in a given case it appears that only two persons are proceeded against by the tax officers of the State for taxes on a particular character of personalty, the courts can not take judicial notice that there are other persons in the State who are also owners of property of that character, and who have not been required to pay taxes thereon.

17. Custom among taxpayers to return their property for taxation at sums less than that required by law will not, as to a taxpayer called upon to pay the full amount of his tax, amount to a denial of

the equal protection of the laws, when the custom was adopted without the authority or consent of the tax officers of the State, and over the protest of such officers.

18. The administration of valid tax laws of a State will not be declared to amount to a denial of the equal protection of the laws, unless it appears that the officers charged by the law of the State with the collection of taxes, knowingly, wilfully, and intentionally
294 so administered the law as to place upon one person or class a burden from which another person or class similarly situated is relieved.

19. The trial judge, to whom the case was submitted on both the law and the facts, having found that the evidence did not disclose any discrimination in the assessment and levy of the taxes on the stock in controversy, as compared with other property in the State, and that the value placed on the stock by the comptroller-general is not excessive, and having also found generally in favor of the defendant on all of the issues of fact in the case, and there being evidence to authorize each finding, and the trial judge having, upon motion for a new trial, declined to disturb the findings made by him at the final hearing, the judgment will not be reversed on the ground that the findings were contrary to the evidence and without evidence to support them.

20. The different acts of the General Assembly relating to the method of collecting the taxes upon the property of railroad companies for State, county and municipal purposes are to be con-trued together, and when so construed they are exhaustive as to the method to be adopted in the collection of taxes of every character imposed by law upon all the property of railroads. When so interpreted, there is nothing in such acts to violate that provision of the constitu-
295 tion of the State which declares that all taxes "shall be levied and collected under general laws."

21. Tax executions, whenever lawfully issued, bear interest at the rate of seven per cent. per annum upon the amount of taxes embraced therein "from the time fixed by law for issuing the same." A tax execution may be lawfully issued whenever the time fixed by law for the payment of the tax has expired; and whenever issued, it bears interest from the first day that it could have been issued.

22. When a taxpayer causes an injunction to be issued, restraining the collection of taxes against him, interest upon the tax execution is not suspended while the injunction is operative, if the taxpayer is by the final decree declared liable for the taxes.

23. When a taxpayer is enjoined from returning given property for taxation and from paying taxes on the same, and the tax officer is also enjoined from levying and collecting any taxes upon such property, at the instance of a third party, the taxpayer is not relieved from the payment of interest on the tax execution subsequently issued, when it appears that the taxpayer was a mere complacent defendant, interposing no obstacle to the injunction, in no way
296 seeking to obtain permission of the court to pay any amount as admitted to be due as taxes, and, so far as the record discloses, acquiescing in the contention of the plaintiff that no tax is due thereon.

24. When a taxpayer is enjoined from making a return of his property or a portion thereof for taxation, and the injunction is subsequently dissolved, he should be allowed the same time for making a return after the dissolution of the injunction as he would have been allowed under the law if no injunction had been granted, and the tax officer should not proceed against such a taxpayer as a defaulter until such time has elapsed.

25. When the injunction issued by the United States Circuit Court restraining the plaintiff from returning for taxation the stock involved in the present case was issued, the plaintiff, under the law, had twelve days remaining of the time in which to make a return for taxation for that year. The comptroller-general not having made an assessment of the property until after the expiration of that time, the assessment was valid, and it was not error to refuse to enjoin the execution issued on such assessment.

26. The injunction referred to in the preceding note having been operative from April 19, 1902, to January 10, 1905,
297 the plaintiff should have been allowed such time for making returns, after the dissolution of the injunction, as the law allowed it during the years 1903 and 1904, that is from January 1 to May 1, four months. The assessments for these years having been made within less than this time, they were unauthorized and illegal, and the execution for these years should have been enjoined from proceeding.

27. The four months which the taxpayer should have been allowed to make a return of the stock for taxation for the years 1903 and 1904, having now expired, and no return of such stock having been made, the executions issued by the comptroller-general should be returned to his office, by him cancelled, and a new assessment for these years made and new executions issued.

28. Even if there was any error in refusing to strike the prayer in the amendment to the answer, on the ground that it was vague and indefinite, the error was not of such a character as to require a reversal of the judgment.

29. All the questions in the present case not dealt within the preceding notes are concluded by for the former decision in this
298 case. The judgment is affirmed, with direction that the decree be so amended as to enjoin the executions for the taxes of the years 1903 and 1904 from proceeding further; in all other respects the decree to stand as rendered.

COBB, *P. J.*:

This case makes its second appearance. See Georgia R. & Bkg. Co. *v.* Wright, 124 Ga. 596. When before this court on a former occasion, numerous questions were involved and were decided. Many of the questions which were then determined appear again in this record. Counsel candidly concede that the questions of law which were determined when the case was here before are no longer open. But it is contended that there are some questions raised in the present record which were not concluded by the former decision. As to those matters where the parties are concluded by the former decision, we will say nothing. We will deal only with such questions as seem

to us not to have been involved or decided when the judgment refusing an interlocutory injunction was under consideration.

1-9. The constitution of this State imperatively requires that all property of every nature whatsoever within the territorial
299 limits of this State shall be subjected to taxation except that which the constitution in terms declares the General Assembly may in their discretion exempt from taxation. Atlanta National Building & Loan Asso. *v.* Stewart, 109 Ga. 80 (2). A single tax upon any species of property will satisfy the demands of the constitution. A tax law will not be construed to tax the same property twice, unless such a conclusion is constrained either by the express provisions of the law or by necessary implication. Gray on Lim. Tax. Power, § 1366. Many, if not all, laws imposing taxes upon property contain provisions which in effect tax some species of property more than once. There are in the tax laws of this State instances where the thing which gives value is twice taxed. Wherever there is the imposition of a tax upon one who holds the tangible article of inherent value, as well as upon another who holds merely the symbol which derives its value solely from the tangible article, the same property is twice taxed.

The property of a corporation is that which gives value to its shares. If a tax is levied upon the property in the hands of the corporation, and a tax is levied upon the value of the shares in the hands of the shareholders, that which gives value to the holdings of the corporation and to the shares of the shareholder is unquestionably subjected to a double burden. While shares of stock are property in the hands of the shareholder they have no inherent
300 value, and derive their sole value from the tangible or other property which is owned by the corporation. The taxation of both the property of a corporation in the hands of the corporation, and the value of the shares in the hands of the shareholders, is manifestly an instance where the same property is twice taxed. It is double taxation, in a sense, but not that species of double taxation which would be void. It is permissible, but not compulsory. Gray on Lim. Tax. Power, § 1372 *et seq.;* Commonwealth *v.* Fall Brook Coal Co. 156 Pa. St. 488 (26 Atl. 1071); Commonwealth *v.* Lehigh Coal Co. 162 Pa. St. 603 (29 Atl. 664).

The act of 1885, (Acts 1885, p. 30) declared that personal property for the purposes of taxation shall be construed to include "all stocks and securities, whether in corporations within the State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State." It is settled by the former decision in this case that this act, so far as it relates to the taxation of shares of foreign stock held by citizens of this State, is still of force. It is therefore unnecessary to determine whether shares of foreign stock held by a citizen of this State is a species of property which the constitution imperatively requires to be taxed. Let it be conceded that the constitution does not imperatively require its taxation, and that the General Assembly has a discretion to determine whether it should be subjected to taxation. The General
301 Assembly exercised this discretion by the passage of the act of 1885, which in this respect stands to this day unrepealed.

If the General Assembly has a discretion in reference to double taxation where the State of Georgia receives the benefit of both taxes, certainly it must have a discretion in regard to this matter where, on account of the character of the property, the taxing authorities of this State can not impose more than one tax. It may be that double taxation results so far as those interested in the property are concerned, the property of the corporation being taxed in one jurisdiction and shares of stock in another jurisdiction. But this necessarily results in every instance where that which gives value is in one jurisdiction, and the owner of that which is a mere symbol of value is within another jurisdiction, and the right to tax is exercised in both jurisdictions. Under such circumstances the escape from double taxation is either a change of residence or a change of investment. It would be more than idle to contend in this day that one who owns shares of stock in a corporation is not an owner of property. It is true that the value of the property depends largely if not entirely upon a fiction of the law. But every holder of a share of stock in any corporation is a property owner. Shares of stock are bought and sold. They are bequeathed to legatees and descend to heirs. They have all the qualities of every other character of property, ex-
302 cept that they have no inherent value. The value of the shares depends upon the value of the property of the corporation which issues them. Their situs for taxation is within limits subject to legislative declaration. The legislature may have even the right under our constitution to declare that the situs for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a situs for taxation in this State. The General Assembly has so declared, and residents in this State who own this class of property must bear the same burden of taxation as is required of owners of other kinds of property.

It is said, though, that even if all this be conceded, the act of 1885 declares that shares of stock in a domestic corporation shall be also taxed, and that the failure of the tax officers to collect a tax upon shares of domestic stock is a denial to owners of foreign stock of an equal protection of the laws, and therefore it is contrary to the provisions of the fourteenth amendment to the constitution of the United States to require the owners of foreign stock to pay taxes upon their shares. The second section of the act of 1885 undoubtedly declares that shares of stock in domestic corporations should be subjected to taxation in the same manner as shares of stock in a foreign corporation. There can be no escape from this conclusion. The words of the section are unambiguous, and it is impossible to place any other construction upon its language.

In the first section of the act of 1885, which contains a
303 number of questions to be propounded to the taxpayer when he makes his returns, appears the following: "The amount of capital invested in stocks of companies, other than such companies as are required to be returned by the president, or their agents, either to the tax receiver or the comptroller-general." The title of this act is, "An act to provide for the correct returns of the property in this

State for the purpose of taxation, and for other purposes." It is manifest from the title that the questions propounded to taxpayers are intended to disclose to the tax officer property which is to be subjected to taxation, and hence the propounding of the question is a legislative declaration that the property which will be disclosed in a correct answer to the question is property which must be taxed If the question calls for the disclosure of property which has an intrinsic value and is located within this State, then of course the property must be taxed, for the constitution imperatively requires that this shall be done. If, however, there is no question which compels the taxpayer to disclose the ownership of that which has no situs for taxation within this State, or which has no taxable value, when there is no legislative declaration to that effect, then the absence of the question indicates a legislative intent not to declare taxable that which has no intrinsic value, but which becomes taxable merely as a result of a law declaring it to have a taxable value. The question above quoted excepts from the answer all stocks in companies
304 where the law requires the president or other agent to return the capital invested in such company to the tax receiver or the comptroller-general. There was no law at that time, nor is there any law at this time, requiring the capital invested in stocks of foreign corporations to be returned by the president or other officer to the tax receiver or comptroller-general. The question propounded in the first section is, therefore, entirely consistent with the provisions in the second section, that stocks in corporations in other States shall be returned by the shareholder, for taxation. At that time the law required railroad companies to make return of their capital to the comptroller-general, and required other corporations within this State to make a return of their capital to the tax-receiver of the county in which the corporation was located. There is no question in the act intended to compel a disclosure by the taxpayer of shares of stock in any domestic corporation. Hence there is a conflict between the first and second sections of the act, and the provisions of the second section must prevail, as being the last expression of the General Assembly on that subject. Lamar *v.* Allen, 108 Ga. 164. The General Assembly may, in the exercise of a sound discretion, say that when that which gives value to the domestic stock has borne its just proportion of the public burden, the owner of such shares shall not be required to pay taxes a second time upon that which has been already taxed. Has the General Assembly said this subsequently to the act of 1885?
305 In 1886, the first section of the act of 1885 was amended, and in lieu of the question above quoted, the following question was propounded. "The amount of capital invested in stocks of companies other than such companies as are required to be returned by the president or their agents to the comptroller-general?" (Acts 1886, p. 27). There was no express repeal of the second section of the act of 1885, and therefore the provisions of that section have remained in force, so far as they were not in conflict with the provisions of the act of 1886. The question under the act of 1886 required the taxpayer to disclose his ownership of stocks in all corporations, foreign and domestic, where the law did not require the presi-

dent or other agent of the corporation to make a return to the comptroller-general. The effect of this act was to relieve from taxation shares of stock in any domestic corporation which the law required the president or agent of such corporation to make a return to the comptroller-general, but left a tax still imposed upon shares of stock in any domestic corporation where the president or agent was not required to make a return to the comptroller-general. The question in the act of 1886 is inconsistent with the provision in the second section of the act of 1885, so far as that provision relates to shares of stock in domestic corporations where the capital of the corporation is returned by the president, or other agent, to the comptroller-general;
306 and to this extent the act of 1885 was repealed by the act of 1886. In 1888 the general tax act (Acts 1888, p. 29) required that the comptroller-general, in additions to the questions required by law to be propounded to the taxpayer, should frame such questions as would reach all property upon which a tax was imposed by that act, and especially certain classes which are set forth in that act. One of these requires the taxpayer to disclose the value of stocks owned in foreign corporations, as well as in domestic corporations, where the capital stock is not returned by the president of the corporation. This was a legislative declaration to the taxpayer that he need not disclose to the tax officer the value of stock he may have owned in a foreign corporation or in a domestic corporation, where, under existing laws, the capital of such corporation was returned by the president. By section 7 of that act the president of all manufacturing and other incorporated companies (or their agents) except railroad, insurance, telegraph, telephone, express, sleeping and palace car companies, were required to return all the property of their respective companies, at its true market value, to the tax-receiver of the county where the company is located, in order that it might be taxed as other property in this State is taxed. The law then required that the companies excepted from the operation of section 7 of this act should return their property, either through their president or their agent, to the comptroller-general. The effect of the act of
307 1886 was to relieve shares of stock in domestic corporations from taxation when the shares were in companies of the excepted class above referred to. The effect of the act of 1888 was to relieve shares of domestic stock from taxation in all other companies, provided the president or agent of such company was required by law to return the property of the corporation to the tax-receiver of the county. After the passage of the act of 1888, no share of stock in a domestic corporation was taxable in the hands of a shareholder, for every domestic corporation was required by law to return its property either to the comptroller-general or the tax-receiver of the county. The general tax acts of 1890, 1892, 1894, and 1896 contain the same provisions as appeared in the tax act of 1888, in practically the same language, and in some instances the identical language, used in that act. (Acts 1890-1, vol. 1, pp. 41, 45; Acts 1892, p. 28, 33; Acts 1894, p. 24, 28; Acts 1896, p. 28, 32.)

We have treated the terms "capital" and "capital stock," used in these provisions of the tax acts which relate to the return for taxation

of the corporation by its president, as meaning the same thing as all the property of the corporation. If there is any doubt as to whether this is the proper meaning to be placed upon these words, that doubt is entirely relieved by the general tax act of 1898 (Acts 1898, p. 36).

The questions to be propounded to the taxpayer are set forth
308 in that act, which are declared to be in addition to those already required under existing laws. The 33rd question is in the following language: "How many shares of stock did you own, on the date fixed for the return of property for taxation, issued by corporations within this State, the capital stock of which, or the property of which, is not returned by such corporation for taxation?" No taxpayer, under this act, was required to disclose to the tax officer the stock owned by him in any corporation within this State when either the capital stock of the company or the property was required by law to be returned to the corporation for taxation. The eighth section of that act provides for the return by the president of all incorporated companies, except where the law requires a return to the comptroller-general of all the property of the corporation to the tax-receiver of the county at its true value. Section 833 of the Political Code is a codification of the first section of the act of 1885, as amended by the act of 1886. The codifiers failed to carry into the code the act of 1888, but there is nothing in that code which is inconsistent with its provisions on the subject of the taxation of shares of domestic stock. The general tax act of 1896 contained provisions similar to the tax act- of previous years. The general tax act of 1898 places the matter beyond all question. (Acts 1898, pp. 29, 36.) The general tax act of 1900 preserves the questions required under

the existing law, and contains the same provisions as to the
309 return of the property of the corporation to the tax-receiver of the county by the president in all those cases where the law does not require the return to be made to the comptroller-general. (Acts 1900, p. 36). This is also true of the general tax acts of 1902, 1904, and 1905. (Acts 1902, pp. 28, 35; Acts 1904, pp. 36, 44; Acts 1905, pp. 37, 43.)

It will appear from what has been said that from the date of the act of 1885, to wit, October 20, 1885, to the date of the act of 1886, to wit, December 27, 1886, shares of stock in domestic corporations were required by law to be returned for taxation in this State. From the date of the act of 1886 to the date of the act of 1888, to wit, December 6, 1888, shares of stock in domestic corporations were required to be returned for taxation only in those companies where the law did not require the president to make a return of the capital or property of the corporation to the comptroller-general. This was certainly the law until the adoption of the code of 1895. The adoption of the code makes no change in this law, for the section of the Political Code above cited is merely a codification of the acts of 1885 and 1886; and though the act of 1888 is not embraced in the code, there is no irreconcilable conflict between the provisions of the act of 1888 and that section of the Political Code. The adoption of the code did not change the law. The existing law was merely declared

and emphasized by the tax act of 1896. The tax act of 1898
310 and subsequent tax acts place the matter beyond all doubt. Shares of stock in domestic corporations are not taxable under the existing laws of this State, and have never been taxable under any law of the State except during the brief period above referred to.

10–11. The constitution declares, "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax." Civil Code, § 5883. If a tax law provide- that that which is property on account of its inherent and intrinsic value shall not be subject to taxation, the law is in violation of the provisions of the constitution just quoted. The General Assembly has no authority to omit from the operation of any tax law anything which is of inherent and intrinsic value as property. If, however, something which is not inherently or intrinsically valuable can be declared by law to have, in the hands of a possessor, a taxable value, the failure of the lawmaking power to exercise its power and declare it is so taxable would not prevent a law imposing a tax on all that which is taxable on account of its inherent value from being a uniform law within the meaning of the constitution. If the General Assembly, in the exercise of the authority vested in it, declares that which is held with no intrinsic value to possess a taxable value, and all persons who have holdings of that character are taxed
311 alike, the law is still uniform, within the meaning of the constitution. A share of stock in a corporation has no inherent or intrinsic value. The General Assembly may declare that for the purposes of taxation it shall have that value which the owner may derive from it in the markets of the world. The General Assembly can not make it a subject of taxation at an arbitrary value, but if it is a thing which can be bought and sold upon the market, it is within the authority of the lawmaking power to declare that for the purposes of taxation it shall be treated in the hands of the owner as of the value which it would command in the market. When that which gives it value has been taxed, the General Assembly is not required, under the constitution, to tax it again through the medium of the shareholder. But it may do so; and when the tax levied is uniform on all shareholders of the same class, the constitutional provision as to uniformity is complied with. A shareholder in a domestic corporation whose property is taxed in the hands of the corporation by the State is not in the same class with the shareholder in a foreign corporation whose property is not taxed and can not be taxed by the taxing authority of the State. Therefore a tax law levying a tax upon the market value of shares in foreign corporations held by citizens of this State, and not levying such a tax upon shares of stock in a corporation in this State where the corporation has paid the full amount of tax upon its property, does not violate the
312 rule of uniformity in our own constitution; nor does it violate that provision in the State constitution which says that protection to property shall be impartial and complete; nor does it violate that provision in the fourteenth amendment to the constitution of the United States which declares that no State shall deny to any

person within its jurisdiction the equal protection of the law. Kidd *v.* Alabama, 188 U. S. 730; Wright *v.* Railroad Co., 195 U. S. 219; Missouri *v.* Dockery, 191 U. S. 165.

12-19. When the constitution of this State declares that protection to person and property shall be impartial and complete, it but states in other language the same principle laid down in the constitution of the United States when that instrument declares that no State shall deny to any person the equal protection of the laws. If the compulsory payment of taxes due by the plaintiff is a violation of the constitution of the United States, it is equally a violation of the constitution of this State. As was held in the case when it was here before, there is ample provision in the laws of this State for proceeding against one who was a tax defaulter in the years that are past. As we have interpreted our laws, they afford ample machinery, consistent with constitutional provisions, for reaching every species of property that is subject to taxation at any time in the past that the taxing power is authorized to proceed for the collection of back taxes. There is no fault in the law. The constitution declares what shall be
313 taxed under all circumstances. The General Assembly has seen proper to bring within the range of taxation some of those things which the constitution does not imperatively require shall be so brought. For every tax which has been lawfully levied, by the General*ly* Assembly, or which the constitution required to be levied, the means for the collection is at hand. With such a construction placed upon our laws, there of course can be no merit in the contention that there is in the law itself a denial of the equal protection of the laws.

But it is said that although the laws may be valid they are not impartially administered. At this time no attack can be made on the tax laws of this State. The plaintiff is concluded by the former decision, and counsel very properly do not invoke from this court a decision on a matter which has already been the subject of an adjudication in this case. It is contended, however, that the evidence in the present record is not in all respects the same as that contained in the former record, and that the evidence now before us shows that the law has not been administered impartially. The plaintiff claims to have proven that the tax officers of the State have applied equal and valid laws unequally, in that, first, the plaintiff and the Central of Georgia Railway Company are the only holder of shares of foreign stock in the State who are required to pay tax upon such stock; sec-
ond, that their foreign stock is taxed at a valuation grossly in
314 excess of the valuation of other property; third, that other property is habitually assessed at only two thirds of its value, while the foreign stock of plaintiff and the Central of Georgia Railway Company is assessed at more than one hundred per cent. of its value; and fourth, that shares of foreign stock and shares of domestic stock are taxable by virtue of the same laws, but the comptroller-general and other tax officers have failed to enforce the statute against the holders of shares of domestic stock.

A State law which upon its face so discriminates against a person or a class as to amount to a denial of the equal protection of the laws

is undoubtedly obnoxious to the provision of the first section of the fourteenth amendment to the constitution of the United States. But this provision of that amendment can be violated in other ways than by the passage of a State law. It has been held a number of times by the Supreme Court of the United States that a denial of the equal protection of the laws within the meaning of this amendment, may arise out of the administration of a law which is perfectly fair upon its face. It has been held that the amendment is not only a limitation upon the legislative power of the State, but also upon the executive and even the judicial authority of the State. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and unequal hand, so as practically to make unjust and illegal
315 discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo *v.* Hopkins, 118 U. S. 373 and cit.; 1 Current Law, 580; 3 *Ibid*, 755. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional prohibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning." Neal *v.* Delaware, 103 U. S. 397; and cit., See also Virginia *v.* Rives, 100 U. S. 313; Strander *v.* West Va., 100 U. S. 303; *Ex. parte* Virginia 100 U. S. 339; Chicago R. Co. *v.* Chicago, 166 U. S. 226; Brannen's Fourteenth Amendment, 97; 3 Current Law, 755. It has been held that "The first section of the fourteenth amendment places a limit upon all the powers of the State, including among others, that of taxation." County of Santa Clara *v.* So. Pac. Ry., 18 Fed. 385, 397. The
316 opinion in the case just cited was delivered by Mr. Justice Field on the circuit. See also Judson on Taxation, sec. 310, *et seq.*; San Francisco Nat. Bank *v.* Dodge, 197 U. S. 70. However, when it is contended that the law of this State is so administered that it denies to a person or class the equal protection of the laws,—not that it is constitutional on its face, but because the manner of its administration is such that it is enforced exclusively against certain classes, the fact of discrimination is matter proof, and not latitude of intention will be indulged, and it is not sufficient to simply allege such exclusive enforcement, but it must also appear that the conditions to which the law was directed do not exist exclusively amongst that class, and that there are other offenders against whom the law is not enforced. Ah Sin *v.* Wittman, 198 U. S. 500. As was said by Mr. Justice McKenna, in the case just cited, "No latitude of intention should be indulged in a case like this. There should be certainty to every intent."

Having reached the conclusion that there was nothing in the law of this State requiring the collection of a tax upon shares of domestic stock during the years involved in the present litigation, of course the failure of the tax officers to collect tax on this character of stock can not be said to be a denial of the equal protection of the laws to any taxpayer. Whether there has been such a denial in
317 other particulars depends upon the proof. The judge to whom this case was submitted, both upon the law and the facts, has rendered a decree in which he makes the following findings: 1. The evidence submitted does not disclose any discrimination in the assessment and levy of the tax on the stock in controversy, compared with other property in the State. 2. The evidence submitted does not show that the value of the stock placed thereon by the comptroller-general is excessive. In addition to this there is in the decree a general finding in favor of the defendants on all of the issues, both of law and of fact. The finding of the judge on the facts of the case carries with it all the sanctity of a verdict of a jury. Upon a motion for a new trial he has refused to disturb his findings of fact. The case therefore stands in the same position before this court as if there had been a general verdict by a jury for the defendant, and a motion for a new trial had been overruled by the presiding judge. Under such circumstances this court invariable applies the rule that the judgment will not be reversed, if there is any evidence to authorize the finding of fact. The plaintiff in error can not prevail here by simply showing that the preponderance of evidence was in its favor. The burden is upon it to show that the finding is entirely unwarranted by the evidence. It would not be profitable to discuss the evidence in detail, or to attempt to
318 reconcile the conflicts which appear therein. If there is any holder of shares of foreign stock in this State who is liable for tax thereon who has not been proceeded against by the tax officers of this State, the record does not disclose the fact. It is said that the court should take judicial cognizance that there are individuals residing in this State who are owners of this class of property. It would be extending the doctrine of judicial notice very far to hold that the courts judicially know the character of the property owned by the individual citizens within the limits of their jurisdiction. The courts judicially know that the mass of property is made up of certain classes and species, such as lands, live stock, household goods, merchandise, debts, credits, stocks, bonds, etc., but they do not judicially know how much is owned by all the citizens, nor do they judicially know in any instance who is the owner of any class of property, or whether there are other owners of such property than those disclosed by the evidence in a particular case. As to those years in which the plaintiff had an opportunity to return its property for taxation and failed to do so, and for which the property has been assessed by the comptroller-general, whether the property has been excessively assessed can not now be inquired into. Under the former ruling in this case it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither
319 averment nor proof that the assessment was the result of fraud or corruption on the part of the comptroller-general.

If there had been, a different question would have been presented. It was contended that there is a uniform custom prevailing in this State for taxpayers to return their property at less than its value. If there is such a custom it did not have its origin with the tax officers of this State; and there was evidence from which the judge could find, even if it did not constrain him to find that taxpayers conforming to such a custom did so without the consent or authority, and over the protest of the tax officers of the State. The law of this State requires that each taxpayer shall return his property for taxation at its true market value. The record discloses that the attorney-general of the State has so advised the comptroller-general, and that the comptroller-general has so instructed the subordinate tax officers of the State. It certainly can not be held that a denial of the equal protection of the laws results to the plaintiff from a custom of taxpayers in contravention of law, which has arisen over the protest and against the instructions of the tax officers of the State. It would be a startling proposition to say that no person should be required to pay his taxes, because some citizens are shrewd enough or unscrupulous enough to succeed in having their returns received by the tax officer when the valuations are lower than the law
320 requires, and lower than the oath which each taxpayer makes to his return requires. There may be persons within the limits of the State, probably many, who have avoided the burden of taxation, either by not returning their property for taxes or by returning it at a value lower than its true market value. But the evidence in this case authorizes, if it does not require, a finding that the tax officers of this State were not parties to such a practice. The administration of the tax laws of a State will not be declared to be in violation of the fourteenth amendment to the constitution of the United States unless it appears that the officers charged by the law of the State with the collection of taxes knowingly, wilfully, and intentionally administer the law so as to place upon one person or class a burden from which another person or class similarly situated is relieved. The record does not disclose that such a case has been made out against the tax officers of the State of Georgia. Mistakes may have been made in the reception of the returns of some taxpayers. Mistakes may have been made in the assessment of property in given instances. But there is nothing in the record to authorize the conclusion that the comptroller-general or the subordinate tax officers have in any instance wilfully, knowingly, or intentionally administered the law so that it would be harsh, burdensome, or oppressive as to one, and relieve another similarly situated from like burdens. As said by the Supreme Court of the United States,
321 this is a matter of proof. "No latitude of intention should be indulged in a case like this. There should be certainty to every intent." Even if the proof does not show a perfect and exact administration of the law, it fails to show such an administration as would bring down upon the heads of the officers the condemnation of the supreme law of the land, which denounces an administration "with an evil eye and an unequal hand." We do not think that the evidence makes such a case as would authorize us to hold that there has been a denial of the equal protection of the laws to the plaintiff,

and that therefore its property should not be subjected to the tax sought to be imposed upon it. Coulter *v.* Louisville & Nashville R. Co. 196 U. S. 599; Florida R. Co. *v.* Reynolds, 183 U. S. 471; Winona Land Co. *v.* Minnesota, 159 U. S. 526.

20. The act of 1874 (Acts 1874, p. 107, Pol. Code, § 780 *et seq.*) prescribed a method to be followed in the assessment and collection of taxes upon the property of railroad companies. The presidents of all railroad companies were required to make a return to the comptroller-general, showing "the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State." In Sav., Fla. & Western Ry. *v.* Morton, 71 Ga. 25 (2), it was held that the act of 1874 was
322 exhaustive as to the method of collecting State taxes on railroad property, and that the property which was used by the company for railroad purposes should be returned to the comptroller-general, as well as that which was not so used, and the entire State taxes upon every character of property owned by the company should be levied by the comptroller-general. In the case of City of Albany *v.* S. F. & W. Ry., 71 Ga. 158, and County of Houston *v.* Central Railroad, 72 Ga. 211, there was an intimation that property owned by railroad companies, not used for railroad purposes, should be taxed in the county where the property was situated, under the general law applicable to individuals; but there was no ruling in either case to this effect. See also City of Atlanta *v.* Ga. Pac. Railway, 74 Ga. 16; Ordinary of Bibb Co. *v.* Central R. Co. 40 Ga. 646. In 1883 an act was passed which provided that all property owned by any railroad corporation of this State, not used by such corporation in its usual and ordinary business, should be taxable by the counties and municipal corporations in which the property was situated, and that such property should be returned for taxation to the proper officers of the county and municipality in which the property was located, the taxes to be collected by execution in the same manner that taxes were to be collected from individuals in the county or municipality. (Acts 1882-3, p. 41.) In 1889
323 the General Assembly passed an act providing for the taxation of the property of railroads by counties. (Pol. Cod, § 784 *et seq.*) This act divided the property of railroad companies into located and unlocated property. The located property was to be taxed in the county of its location. The unlocated property was to be valued as a whole, and each county through which the road ran was given a proportion of the taxes on such unlocated property. In 1889 that portion of the act of 1874 requiring returns by the presidents of railroad companies to the comptroller-general was amended by adding, after the words "railroad companies," the following words, "including street railroads, dummy railroads, and electric railroads." See Pol. Code, § 780. In 1890 the General Assembly passed an act declaring that all the property, both real and personal, belonging to railroad companies in this State, within the taxable limits of any municipality, was subject to

taxation by such municipality. The method of collecting the taxes was that to be followed in the act providing for the county taxation of railroads, the presidents of such companies being required to add to their returns such additional facts as were necessary to carry out the scheme of taxation by municipalities. Acts 1890, p. 152; Pol. Code, § 725 *et seq.*; see in this connection, Columbus So. Ry. Co. *v.* Wright, 89 Ga. 574; Sparks *v.* Macon, 98 Ga. 301; City of Atlanta *v.* Wright, 119 Ga. 207. The act of 1874 provided a method of collecting State taxes on railroad property, the act of 1889 a
324 method of collecting county taxes on such property, and the act of 1890 a method of collecting municipal taxes on the property of such companies. When these acts are considered together, it is manifest that it was the intention of the General Assembly that they should be exhaustive of the method of assessing and collecting all taxes required to be paid by railroad companies on property owned by them. We are strengthened in this view of the matter by the fact that the codifiers of the Code of 1895 having omitted from the code the provisions of the act of 1883 requiring railroad companies to return property not used for railroad purposes to the proper officer of the county and municipality where such property is located. It was properly omitted, for it conflicted with the scheme provided by the three acts above referred to. Under this scheme, located property is to be taxed in the county or municipality where located, without reference to whether it is used for railroad purposes, or whether it be real property or personal property. The unlocated property is to be distributed to the different counties or municipalities according to the plan provided in the acts. All property of every nature whatsoever is to be embraced in the return to the comptroller general. He is to see that the amount of taxes due the State is collected, and also the amount of taxes due each county and municipality on property located within the limits of the same, as well as the proportion of taxes due each on the
325 unlocated property. If a railroad company owns real property or personal property within the limits of a county or municipality which is not used for railroad purposes, it is still subject to the same tax as like property owned by individuals. The tax goes to the county or municipality. In case of individuals the return for taxation would be made to the tax-receiver of the county. In case of such property owned by a railroad company the return is made to the comptroller-general. We see nothing in this provision of the law which conflicts with the requirement of the constitution, that taxes must be collected under general laws. It has been held that the provision in the act of 1889 and the act of 1891 providing that the located property of railroad companies used for railroad purposes should be returned to the comptroller-general, instead of the tax-receiver, was not in conflict with the provision of the constitution above refered to. See Columbus So. Ry. Co. *v.* Wright, and Sparks *v.* Macon, *supra.* We can see no reason why a different rule should be applied to located property not used for railroad purposes. The railroad company is required to pay no higher rate of taxation than any other property owner. It is re-

quired to pay its taxes on the same day on which every other property owner is required to pay; and so far as the substance of the matter is concerned, they stand upon exactly the same footing as an individual. We think it within the power of the General
326 Assembly to provide that a railroad company should make a single tax return of all property owned by it, such return to be used as the basis for all the taxes levied by the State and its political subdivisions. In the acts above referred to, the General Assembly has done this, and under this scheme, the rights of the county and municipality are fully protected in regard to the amount of tax due each, and the rights of the railroad company *is* also fully protected as to the amount of the taxes required of it. If the shares of stock in the foreign corporation upon which it is sought to collect a tax in this case had been owned by an individual residing in Richmond county, he would have been required to return the same for taxes to the tax-receiver at their true market value, and also to the proper officer of the City of Augusta. That is, the location of the property would be in the county and city where the owner resided. Being owned by the plaintiff, a corporation whose principal office is in the city of Augusta, it is taxable in the county and municipality where the company resides, that is, in the place where its principal office is located. Prior to 1889 the law required the property to be returned to the comptroller-general for State taxation, and to the proper officers of the county and municipality for county and municipal taxation. Under that system, if there had been a disagreement between the company and the tax officers in reference to the value of the property, it was in a position where it might be
327 assessed at one value for State taxation and at another value for county taxation, and still another value for municipal taxation. Under the present system this would be impossible, as the return for all the purposes of taxation is made to one officer and an assessment by him for State taxes is to be followed when county or municipal taxes are to be collected. There was no error in refusing to enjoin the execution from proceeding on the ground that the assessment should have been made, and the execution should have been issued by the proper tax officers of Richmond county instead of the comptroller-general of the State.

21. The general rule is that taxes as such do not bear interest. The taxpayer is only required to pay interest in those cases where the statute requires it to be done. Ga. R. & Bkg. Co. *v.* Wright, 124 Ga. 596. In 1889 the General Assembly passed an act which declared "All executions issued for taxes * * * shall bear interest at the rate of seven per cent. per annum from the time fixed by law for issuing the same." (Acts 1889, p. 31; Pol. Code. §§731, 887.) It is said that this act, properly construed, does not declare that taxes shall bear interest, but that only an execution for taxes shall bear interest. We think this a proper construction of the act. If a taxpayer tenders the amount of taxes due from him before an execution is actually issued, no interest on the tax can be lawfully required of him. But if he fails to pay his taxes until after the execution
328 is issued, he must pay interest, and the question is, from what time shall the interest be calculated? An answer to this must

appear from the statute, and is contained in the words, "the time fixed by law for issuing" the execution. What time does the law fix for issuing an execution for taxes? The day following the last day that the law allows for the payment of taxes. When a taxpayer has failed to pay his taxes within the time required by law, the tax officer is authorized, under the law, to immediately issue an execution against him. The delay of the officer in issuing the execution may permit the taxpayer to come in and tender his taxes without interest before the execution is issued. But whenever the execution is issued, no matter at what time, provided it is issued within the time authorized by law, it bears interest from the time it might have been issued in the first instance. As the taxes sought to be collected in the present case were due on the 20th day of December, in each year in which they were payable, the comptroller-general had the right, under the law, to issue the executions immediately after that day in each year. If the plaintiff had not desired to pay interest on the executions, it should have tendered to the comptroller-general the amount of its taxes, before the executions were actually issued. Once issued, they carry interest from the day on which they could have been first lawfully issued.

329 Lord Nottingham, the author of the statute of frauds, in a decision relating to a provision in that statute, says: "I have some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lords' house, though it afterwards received some additions and improvements from the judges and civilians." Lord Campbell said, in reference to this remark, "If Lord Nottingham drew it, he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed." 4 Camp. Lives of the Chancellors, 228. It so happens that I was the author of the act of 1889 providing that tax executions should bear interest. If Lord Nottingham was right, I know more about what it means than any one else. If Lord Campbell is correct, I know less. It being my duty however, to construe the act, I have endeavored to do so, and so far as possible to eliminate from consideration the motive and circumstances which impelled me to frame the bill and request its introduction in the General Assembly. Whether I have been controlled by what I intended, more than by what I expressed, I do not know, but the construction placed upon the act in the present case seems to me the true interpretation of the words used. Perfect candor, however, requires the statement that the construction now placed on the words of the act is precisely what I privately intended.

330 22-23. If a taxpayer causes an injunction to issue to prevent the collection of a tax, and, under the final decree, liability for the tax is established, of course the taxpayer is not relieved from interest on the tax execution pending the proceedings in which he obtained the injunction. This proposition, of course, can not be seriously questioned; and we do not understand that it is questioned in this case. But it is said that from April 19, 1902, to January 10, 1905, both the comptroller-general and the Georgia Railroad &

Banking Company were under an injunction from the circuit court of the United States for the northern district of Georgia, restraining the former from assessing or collecting any tax upon the stock involved in the present case, and restraining the latter from returning the same for taxation or paying any taxes thereon; and that on account of this condition of affairs, the State should not exact interest from the taxpayer on the tax subsequently declared valid during the period above referred to. It is true that the plaintiff in the present case was a defendant in that case. It is also true that it was not an ateive defendant. It was thoroughly complacent. If it did not agree with the contention of the complainant that the stock was not taxable, it certainly did not raise its voice in protest against that position. When the circuit court held that the property was not taxable, it declined to unite with its codefendant in an appeal from that decision. It did not occupy in that litigation the posi-
331 tion of a taxpayer willing to pay its taxes, who was prevented from doing so by the strong arm of the law. As soon as it was finally determined in that case that the stock was taxable, the complacent defendant of that proceeding became the active plaintiff in a proceeding in a State court, in which the same contentions were set up as were set up by the complainant in the United States Court. It has never admitted to this day that it was liable for any taxes on this property. There is nothing in the circumstances as they appear in the record of the case in the United States court, taking it alone, or as they appear in the record in this case, taking it alone, or as they appear taking the two records together, which places the plaintiff in a position where it was the holder of a fund belonging to another party that it was willing to pay over, its failure to pay being alone the result of a process of a court of competent jurisdiction. In the proceeding in the State court its avowed position is that there is no liability upon it whatever. In the United States court it silently acquiesced in a position to that effect, taken by its lessess, who under contract with it was bound to pay all taxes upon the property. There seems to be a general rule that when a party is restrained by injunction from paying over funds in his hands to the person entitled thereto, he will not be chargeable with interest while so re-
332 strained. 16 Ency. Law (2d ed.) 1068. Wherever a person has funds in his hands belonging to another party and is willing to pay them over, or where a person owes a debt and is willing to pay it, and the person having the funds or owing the debt is restrained by an injunction, and there is no way in which the money can be paid into court so as to relieve him, it would be equitable and just that, during the pendency of the proceeding which he had no part in instituting, he should be relieved from interest on the debt. But this rule can not be applicable to the case of a party who does not admit that he has funds in his possession, and does not admit any liability for a debt to any one, but, under one set of circumstances silently acquiesces in the proposition that no debt is owed, and under other circumstances positively asserts that there is no liability. If there is any authority for the proposition contended for in this case, it has not been called to our attention. In Little *v.* Owen, 32

Ga. 20, the rule is stated that interest is suspended against a garnishee during the pendency of the garnishment. At that time there was no law authorizing a garnishee to pay money into court. Judge Lumpkin, in the opinion, said: "He could not pay it, of course, to the defendant. It would seem reasonable, therefore, that the interest should be suspended during that time. Besides, the defendant will not lose it. He can sue Dickerson on his bond, and the lost interest will constitute an item of damage which Little has sustained
333 by reason of suing out the garnishment. We express no opinion whether Owen might not have been protected, had an order been taken requiring him to pay the money into court, although we see no authority under the statute for such a proceeding." In Branthwait *v.* Halsey, 9 N. J. L. 4, the obligee of a bond, for the purpose of having it collected, made an unconditional assignment to B, and, afterwards fearing that B would appropriate the money to his own use, filed a bill in equity to restrain the obligor from paying the money to B, and B from receiving it. It was properly held in that case that during the continuance of the injunction sued out by the obligee against the obligor, the obligor was not liable for interest. That was a case, in effect, where a creditor enjoined a debtor from paying his debt to him, and under such circumstances it would be inequitable to require the debtor to pay interest to one at whose instance he was enjoined from paying the debt. In the opinion in that case several cases are cited. In one it was held that a debt due from an American debtor to a British creditor did not bear interest during the revolutionary war, and that interest was abated until the return of peace. Carnes *v.* Penn, 1 Peters, 524. A similar ruling was made by the Supreme court of Pennsylvania, in Hoar *v.* Allen, 2 Dallas, 102. In McCall *v.* Turner, 1 Call, 133, the Court of Appeals of Virginia held that where a creditor by his own act puts it out of the power of a debtor to make payment, interest is not recover-
334 able. There are other cases referred to in which it was held that interest would not run where the debtor was restrained from the payment of the debt by the operation of a foreign attachment. Chief Justice Ewing, who delivered the opinion in the New Jers-y case, after referring to the cases above cited, sums up the principle in these words: "The principle of these cases is, that when payment is prevented by the interposition of the law or the act of the creditor, interest is not recoverable." It certainly can not be the law that a landlord is relieved from interest on tax executions during a period of time when he is enjoined from paying taxes at the instance of a tenant, who under the lease is liable for the taxes, when the landlord takes no steps to relieve himself from the process sued out by the tenant, and silently acquiesces in the contention of the tenant that no tax is due.

24–27. The law requires that the returns for taxation of all railroad companies shall be made to the comptroller-general by the first day of May in each year. (Pol. Code, § 805.) Upon failure to make the return, the comptroller-general is authorized to make an assessment, from the best information he can obtain, and to issue an execution against the company for the amount of the taxes due, accord-

ing to law. (Pol. Code, §§ 780, 813, 874.) It was held in the former decision in this case that these sections of the code
335 were applicable whether there was an entire failure to make a return, or only an incomplete and partial return. The stock involved in the present controversy should have been returned by the plaintiff for taxation by the first day of May in each of the years from 1895 to 1901 inclusive. No such return was made for these years. There was nothing to prevent a return in any of these years. The authority of the comptroller-general to make an assessment on the stock from the best information he can procure was therefore complete, so far as these years were concerned. On April 19, 1902, the injunction of the United States circuit court issued, which restrained the comptroller-general from assessing or collecting any taxes upon the stock for any year, and also restrained the plaintiff from returning the stock for taxation or paying taxes thereon. This injunction was finally dissolved on January 10, 1905. On February 7, 1905, the comptroller-general assessed the value of the stock for taxation for each year from 1895 to 1904 inclusive, and issued executions for the amount of taxes due on such assessment for each of these years. At this date the comptroller-general was fully authorized to assess the stock and issue the executions for the years 1895 to 1901. But was he on that date authorized to assess the stock for the years 1902 to 1904? When the injunction issued by the circuit court was finally dissolved on January 10, 1905, the status of the railroad company as to returning the property for taxation
336 should have been restored, as near as possible, as it existed at the time it was issued, so far as the return for 1902 was concerned, and the same length of time should have been allowed for a return for the years 1903 and 1904 as the law allowed during those years. When the injunction issued April 19, 1902, the railroad company had remaining twelve days of the time allowed by law to make a return. It should have made a return within this time, after the date of the dissolution of the injunction. Having failed to do so, the comptroller-general, after the expiration of this time, was authorized to proceed to assess the property and issue the execution. The law allowed the plaintiff from the first day of January to the first day of May, in each of the years 1903 and 1904, to return the stock for taxation, that is, a period of four months. This time should have been allowed to the railroad company to make the return, before the assessment was made. The assessment was made on February 7, 1905, for the years 1903 and 1904, and was therefore premature and void, and the executions issued for those years should have been enjoined. See, in this connection, State *v.* Southwestern Railroad 70 Ga. 12, (3). The railroad company failed to make a return within four months from the time of the dissolution of the injunction, and has not yet made any return. The time for the return having now expired, the company is to be treated as a defaulter for these years, and the comptroller-general may
337 proceed to assess the stock and issue executions for the taxes due. The executions for the years 1903 and 1904, heretofore

issued, should be returned to the office of the comptroller-general and cancelled.

28. The plaintiffs contend that the valuation placed by the comptroller-general upon the stock was excessive. The defendant contended that as the plaintiff was a defaulter, the valuation of the comptroller-general was conclusive, under the law. In an amendment to the answer, the defendant alleged that the valuation placed upon the stock by the plaintiff was not its true market value, "but on the contrary, the true market value is as assessed by the comptroller-general," and concluded the amendment with a prayer "that the court may so find and decree." The plaintiff objected to the allowance of this amendment, on the ground that the court was without jurisdiction to assess or revalue the same for the purpose of taxation, and that the prayer was vague and indefinite. The court ruled that it could not in this case decide or fix the value of the stock for the purpose of determining the amount for which the execution should proceed, but that it would hear evidence with a view of determining whether the assessment was excessive, and refused to strike the prayer. Evidence was heard in reference to the method adopted by the comptroller-general in reaching the valuation placed by him upon the stock, and there was a finding, in the final decree,
338 that the valuation was not excessive. As has been said, there was evidence justifying this finding of fact. Under the circumstances even if there was any error in refusing to strike the prayer of the amendment to the answer, the error was not of such character as to require a reversal of the judgment.

29. The foregoing discussion disposes of all the questions made in the record which in our opinion are not concluded by the former decision. The rulings in the former decision are affirmed and adhered to. Upon further consideration and reflection, they are altogether satisfactory, and even if they were not so, we would be constrained to follow them as the law of this case. Southwestern Ry. *v.* Wright, 68 Ga. 312 (7). The judgment will be affirmed with direction that the decree be so amended as to enjoin the executions issued for the taxes for the years 1903 and 1904 from proceeding, and in all other respects stand as rendered.

Judgment affirmed with direction. All the Justices concur.

339 Supreme Court of the State of Georgia.

ATLANTA, GA., *May* 24, 1906.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

GEORGIA R. R. & B'K'G CO.
VERSUS
W. A. WRIGHT, Comptroller-General, ET AL.

This case came before this court upon a writ of error from the Superior court of Fulton county; and, after argument had, it is

considered and adjudged that the judgment of the court below be affirmed with direction that the decree be so amended as to enjoin the execution for the taxes for the years 1903 and 1904 from further proceeding; the decree in all other respects to stand as rendered.

All the Justices concur.

Bill of costs, $10.00.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *Jul-* 10, 1906.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Georgia Railroad paid the above bill of costs.

Witness my signature and the seal of said court affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

340 34 Atlanta—October, 1905.

GEORGIA RAILROAD AND BANKING COMPANY
v.
WRIGHT, Comptroller-General, ET AL.

By the COURT:

1. In a suit in equity in the circuit court of the United States A and B were nominally codefendants, though in reality B's interests were adverse to those of A, and indentical with those of the plaintiff. Judgment was rendered for the plaintiff; whereupon A notified his codefendant to join in an appeal. This B declined to do, expressing himself as content with the decree rendered; and A then took an order allowing him to sever and appeal alone. On final trial in the United States Supreme Court the judgment of the trial court was reversed and the original bill dismissed. *Held*, that in a subsequent action by B against A growing out of the same cause of action in the State courts, B was estopped to set up any matter which was or might have been pleaded by him in his own substantial interest in the Federal court.

2. A suit to enjoin the collection of taxes for one year is no bar to a suit to enjoin similar taxes for another year. This is so because the taxes for each year constitute a separate cause of action. (Lumpkin, J. dissents.)

341 (Per LUMPKIN, *J.*)

2. (*a*). If there is an estoppel by judgment at all in this case, under the pleadings and decree in the record from the Federal court it extends not alone to the tax of one year but to the taxability of the stock. Under the pleadings and evidence before it and the prayers

of the bill, the decree of the circuit court of the United States contained the following: "It is further ordered and adjudged that the said William A. Wright, comptroller-general, is without any authority of law to undertake to collect taxes upon said shares of stock, and is not authorized as comptroller-general so do do, and he is hereby perpetually enjoined from issuing any execution or taking any steps to collect said taxes upon said shares of stock, and that the said Georgia Railroad and Banking Company is enjoined from making any return of said shares of stock for the purpose of taxation, or from paying any taxes thereon, or doing any act or thing recognizing liability of said shares of stock to be taxed." This was the decree reversed by the Supreme Court of the United States.

3. The case of Wright *v.* Southwestern R. Co., 64 Ga. 783, announced as the law of this State that the situs of stock in a foreign railroad corporation whose road was located outside of Georgia was in the State where the road was located, and that therefore the stock was not taxable in this State. That case was of binding, statutory effect until the passage of the act approved October 20, 1885, which gave such stock a situs for purposes of taxation in Georgia.

342 4. Under the title, "An act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes," the General Assembly could constitutionally enact that certain specified objects should be considered personal property for the purpose of taxation.

5. The failure of the compilers of the code of 1895 to embrace therein the provisions of the act of 1885, referred to in the third headnote, did not, in the absence of conflicting statutes in that code, amount to a repeal by implication of the portion of the act referred to; and that portion of the act is still the law of Georgia.

6. The failure of the taxing authorities to directly tax shares of stock in domestic corporations whose property is located in Georgia as property in the hands of the shareholders (the corporate property being taxed instead), while at the same time levying a direct tax upon shares of stock in foreign corporations whose property is outside the State belonging to citizens of Georgia, is not a denial to the holder of the foreign shares of the equal protection of the laws.

7. It is not in this case necessary to determine whether shares of stock in a domestic corporation in the hands of a stockholder are required to be taxed as such in order to comply with the uni-

343 formity clause of the constitution. Nor is it necessary to determine, if domestic shares are taxable, whether it would be double taxation to assess them for taxation in the hands of the shareholder and also include them in the return made by the president of the corporation as required by law.

(Per CANDLER, *J.*):

7 (*a*). All property in the State, not exempt under the constitution, must be taxed. Stock in corporations is property. When the corporate property is in Georgia, a tax upon it is in effect a tax also upon the stock. When the corporate property is outside the State and cannot be taxed, and the stock is held by a citizen of Geor-

gia, the stock must be directly taxed as the property of the citizen. This is not a violation of the constitutional provision that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

8. The court below was fully authorized to find that in the administration of the law the policy of the State was not such as to deny to the plaintiff in error the equal protection of the laws.

9. The sections of the Political Code which prescribe the
344 steps to be taken by the comptroller-general in the event of the failure of individuals or corporations to make returns for taxation are not restricted to cases where no return whatever is made, but apply equally to cases where property owned by the citizen and subject to taxation is withheld from the return.

10. The acceptance by the comptroller-general of a return from which taxable property of the citizen has been omitted does not bar the State of its right subsequently to proceed against the delinquent for the tax due on the omitted property.

11. The Georgia scheme of taxation requires the citizen to know what property owned by him is subject to taxation and contemplates that he will disclose it fully to the taxing officer. Every opportunity in the way of notice, protest, hearing, and arbitration is afforded him to correct any mistake of that officer and to obtain exact and even justice. To the defaulter no "machinery" is furnished for the correction of his own error; he is entitled to no notice, hearing, or arbitration, but the officer is required, from the best information obtainable, to ascertain the value of the property and assess it accordingly. This scheme of taxation is not unconstitutional.

345 12. It does not appear that the comptroller-general, who, in arriving at the value of the property taxed, was only obliged to proceed upon "the best information he could procure," made an excessive assessment.

13. The fact that the plaintiff in error made annual statements showing its ownership of the stock sought to be taxed, and that these statements were accessible to the comptroller-general, does not bar the right of the State to collect the tax on the stock for the years when it was not returned.

14. Until the passage of the act approved November 11, 1889, taxes did not bear interest in this State.

15. The assessments made showed on their face every jurisdictional fact necessary to authorize the comptroller-general to proceed thereunder.

16. A statement made to the taxing officer, "for the purpose of furnishing the office of the comptroller-general with information sought by said office, and not for the purpose of making a return of property for State taxation," can not be treated as in any sense a return.

346 17. Section 3777 of the Civil Code, providing a bar for the State in certain cases when the citizen would under like circumstances be barred, is in derogation of the common law and of

the right of the State to exercise its sovereign power of taxation, and should be strictly construed.

18. Section 3775 of the Civil Code, providing an equitable bar in cases where "from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights," is not available to a complainant in an equitable proceeding to enjoin the enforcement of a purely legal right.

19. A tax is not a debt in the sense that it will be barred by a statute of limitations against "actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking."

20. The act of 1887 (Pol. Code, §§ 890, 891), when construed as a whole, provides a statute of limitation against the right of the State and its subordinate public corporations to enforce a lien for taxes. Such a lien is barred not only by a failure to have the proper entries made on the tax execution and recorded as required by the act, but also by a failure to issue the tax execution within seven years from the date that such execution may be lawfully issued.

347 The lien of the State or its subordinate public corporations is to this extent placed by the act above referred to fully under the operation of the "dormant-judgment act." (Candler, J., dissents.)

20 (*a*). (Per Candler, J.) Sections 890 and 891 of the Political Code interpose a bar to the enforcement of claims for taxes only after they have been placed in execution, and do not apply to the State's claim for taxes before an execution has been issued.

21. The statute of limitations did not run against the State during the time that the comptroller-general was enjoined by the Federal court from issuing any executions for taxes on the stock in dispute.

348 By an act approved February 27, 1875 (Acts 1875, p. 235), the General Assembly authorized the Georgia Railroad and Banking Company and the Central Railroad and Banking Company of Georgia to become purchasers of the Western Railroad of Alabama, its property and franchises or any part thereof, at any sale of the property that might be had in Georgia or Alabama or both, the act providing that the companies mentioned "may hold the title to the same under their existing corporate capacities, or may acquire and hold stock in the present Western Railroad Company of Alabama, or any new corporation that shall be organized to take the place of the same." Under this act the two railroad companies referred to purchased, on September 1, 1875, each an undivided one-half interest in fee of the property and franchises of the Western Railroad Company of Alabama. On May 7, 1881, the Georgia Railroad and Banking Company leased to William M. Wadley and assigns all of its interest in the Western Railroad of Alabama for a period of ninety-nine years from April 1, 1881, "and he and his assigns have remained in possession thereof ever since, and have, to the exclusion of (the Georgia Railroad and Banking Company), controlled, managed and used said railroad and its franchises and received all the gross earnings of said half interest; have paid one half of, the operating expenses, taxes, and other fixed charges; and

have retained for themselves a half of the net earnings, when there were any net earnings." In October, 1882, the two railroad companies (which, for convenience will be called the Georgia and
349 the Central railroads), acting in concert, procured their incorporation under the laws of Alabama as the Western Railway of Alabama; and the Georgia Railroad made a deed to the new corporation, conveying all of its interest in the railroad properties already mentioned. The Western Railway of Alabama was eventually capitalized at $3,000,000, and one half of the stock, or fifteen thousand shares, was issued to the Georgia Railroad. William A. Wright, comptroller-general of Georgia, early in the year 1905, made a demand upon the Georgia Railroad for taxes on these fifteen thousand shares of stock for each of the years from 1883 to 1904 inclusive, with interest on the tax of each year from December 20 of that year at the rate of seven per cent. per annum, the aggregate of the principal of the taxes demanded being $125,974. The demand was refused; whereupon the comptroller-general issued twenty-two executions, aggregating the amount mentioned, and placed them in the hands of Nelms, sheriff of Fulton county, for levy. The present suit arises upon the petition of the Georgia Railroad to enjoin the enforcement of the executions or the collection of the tax on its stock in the Western Railway of Alabama for the years mentioned. The petition and the amendments thereto are voluminous, and, together with the answer of the defendants, present a large number of points for adjudication. In the interest of brevity these points will not be enumerated at this stage of the discussion, but will be taken up and disposed of seriatim. The trial court
350 denied an injunction, and the plaintiff excepted.

Joseph R. & Bryan Cumming, Alexander C. King, Joseph R. Lamar and Sanders McDaniel, for plaintiff.

John C. Hart, attorney-general, Boykin Wright, and Hoke Smith, *contra*.

CANDLER, *J.* (after making the foregoing statement):

1. Shortly after the lease by the Georgia Railroad to Wadley was made, it was assigned to the Louisville & Nashville Railroad Company, which subsequently became the sole lessee of the Western Railway of Alabama; and in 1899, the Atlantic Coast Line Company acquired a half interest in the lease. Under the terms of the lease, the lessee companies were bound to pay all taxes that might be collectible from the lessors. In August, 1901, the Louisville & Nashville Railroad Company and the Atlantic Coast Line Company, citizens respectively of Kentucky and Virginia, filed in the United States circuit court for the northern district of Georgia a bill in equity against Wright, comptroller-general, and the Georgia Railroad and Banking Company, reciting that the comptroller-general had demanded of the Georgia Railroad taxes upon its fifteen thousand shares of stock in the Western Railway of Alabama for the year 1900, that under the lease to them the lessee companies, and not the Georgia Railroad, would have to pay the tax if it were collected; that under the

laws of Georgia the shares in question were not subject to
351 taxation; and praying that the comptroller-general be enjoined from collecting, and the Georgia Railroad from paying, the tax demanded. On the hearing before the judge of the circuit court an injunction was granted. The comptroller-general, desiring to appeal the case, served on his codefendant, the Georgia Railroad, the following written notice: "A decree having been entered in the above stated case against the defendants, and William A. Wright, comptroller-general, one of the defendants, desiring to appeal to the circuit court of appeals, you as a codefendant therein are hereby respectfully notified to appear and join in the appeal." Service of this notice was acknowledged, and the reply made thereto that "Defendant hereby refuses to join in said appeal, being content with the decree rendered in said cause." An order was then taken by the comptroller-general permitting him to make the appeal alone, and this was accordingly done. The circuit court of appeals affirmed the decision of the circuit court, and the case was then taken by certiorari to the Supreme Court of the United States, where the decisions of the courts below were reversed, and the cause "remanded to the circuit court of the United States for the northern district of Georgia, with directions to dismiss the bill of complaint." The mandate of the Supreme Court was duly made the judgment of the circuit court. In their answer to the petition filed by the Georgia Railroad in the present case, the defendants pleaded *res adjudicata*, or,
352 to be more accurate, estoppel by judgment, claiming that the Georgia Railroad is concluded by the judgment against it entered in accordance with the mandate of the Supreme Court of the United States, whereby the original bill of complaint was dismissed; and this plea raises one of the most difficult and important questions in a case abounding in questions of that character.

In the suit in the Federal court the Georgia Railroad was nominally a codefendant of the comptroller-general, but in reality an adverse party at interest. The judgment enjoining it from paying the tax was exactly what it desired, and its interest lay in affirming, rather than in disturbing that judgment. Consequently, when its codefendant, the comptroller-general, took the case to the higher court, if it desired, in its own name, to be represented in the appellate proceedings as to its real and substantial, rather than its fictitious interests, it had every opportunity by appropriate adversary pleadings to place itself nominally as well as really at arm's length with its codefendant. It preferred, however, to leave its lessors to defend its substantial rights, and to allow the judgment, nominally against it but really in its favor, to remain undisturbed by any act of its own. The judgment of the Supreme Court of the United States was rendered in a case to which, nominally, it was not a party, but which involved questions very vital to it and to which it had every opportunity to be made a party in its own name. The judgment against the Louisville & Nashville and Atlantic Coast Line companies
353 necessarily and in terms carried with it an adjudication that the Georgia Railroad was liable for the tax on this stock for the year 1900; and when, in accordance with the mandate of the

Supreme Court of the United States, the original bill in equity filed by the two plaintiff companies was dismissed, the Georgia Railroad was concluded as to all questions growing out of that cause of action, which were or might have been raised by it to protect its interests in that suit. "The mere circumstance of any persons having been formally arrayed on the same side in a suit is immaterial, * * * and it is agreed upon now, that they will be estopped by a decision on a matter which was actually an issue between them, and as to which they had an active controversy against each other." Hukm Chand, Res Adj. § 78; Van Fleet, Former Adj. § 256, p. 576; 24 Am. & Eng. Enc. L. (2d ed.) 733; 1 Dan. Ch. Pl. & Pr. (6th Am. ed.) *659; Foster's Fed. Pr. § 300; Case *v.* Beauregard, 101 U. S. 688; Corcoran *v.* Chesapeake Canal Co., 94 U. S. 741; Riley *v.* Bank, 81 Md. 14, s. c. 31 Atl. 585; Louis *v.* Brown Township, 109 U. S. 163; Scotland County *v.* Hill, 112 U. S. 183; Waldo *v.* Waldo, 52 Mich. 91, s. c. 17 N. W. 709.

2. Counsel for the Georgia Railroad, however, contend that even if it is concluded by the judgment of the Supreme Court of the United States as to its liability for the tax sought to be enjoined in the proceedings before that court, the estoppel of the judg-
354 ment extends only to the question of the railroad's liability for the tax for the year 1900, and that it is not cut off from contesting the validity of the tax for all the other years involved in the present suit, from 1883 to 1904, inclusive. The question turns, of course, largely if not entirely upon whether suits for different taxes, or for taxes for different years, constitute different causes of action; for suits to enjoin the collection of taxes would necessarily be governed by the same principles. In 2 Cooley on Taxation, 845, it is said: "Upon the question whether a judgment establishing a liability to pay taxes for certain years is, in a subsequent action between the same parties, *res adjudicata* as to the liability for taxes of a succeeding year when the facts affecting the liability are the same in the two cases, the authorities do not agree. It is held in Iowa, Kentucky, Michigan, Mississippi, and Tennessee, that the judgment for a tax is conclusive as to that tax merely, and in suits for taxes of other years is important only as a precedent. (Citing Davenport *v.* Chicago R. Co., 38 Ia. 633, 640; Newport *v.* Commonwealth (Ky.), 50 S. W. 845, s.c. 51 S. W. 433; Louisville Bridge Co. *v.* Louisville (Ky.), 58 S. W. 598, s.c. 65 S. W. 814; Michigan R. Co. *v.* Auditor-General, 9 Mich. 448; Lake Shore R. Co. *v.* People, 46 Mich. 193; Adams *v.* Yazoo R. Co., 77 Miss. 194; State *v.* Bank, 95 Tenn. 222; State *v.* Bank, 95 Tenn. 231; Union Bank *v.* Memphis, 101 Tenn. 154.) Recent decisions of the Federal Supreme Court main-
355 tain the contrary doctrine, but have not met the approval of the State tribunals." In Keokuk R. Co. *v.* Missouri, 152 U. S. 301, relied upon by counsel for the railroad company in the present case, it was held that "A suit for taxes for one year is no bar to a suit for taxes for another year;" and in the opinion Mr. Justice Brown said: "The two suits are for distinct and separate causes of action. If there were any distinct questions litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Crom-

well *v.* County of Sac, 94 U. S. 351. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. * * * In the case of Davenport *v.* Chicago R. Co., 38 Ia. 633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the tax for a subsequent year, each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, *both growing out of the same transaction,* in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not in any
356 just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision." As indicated by the quotation which we have made from Cooley on Taxation, however, the Supreme Court of the United States has not adhered to the principles announced in the case cited. See New Orleans *v.* Citizens Bank, 167 U. S. 371; Baldwin *v.* Maryland, 179 U. S. 220; Deposit Bank *v.* Frankfort, 191, U. S. 499. In Newport *v.* Commonwealth (Ky.), 50 S. W. 845, it was held that a judgment for the defendant in an action to recover taxes for one year is not a bar to an action to recover taxes on the same property for another year. Hazelrigg, C. J., and Burnam, J., concurred in a separate opinion on this branch of the case, which is reported in 51 S. W. 433, and from which the following forcible language is quoted: "The power to tax is a high governmental power, exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication
357 would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties. As matter of public policy, and upon grounds of public necessity, we think, the principle of *res adjudicata* ought not to be applied to questions of taxation where the State is exercising its sovereign power." In Georgia authority on the subject now under consideration is scant, and only indirectly in point. Mayor of Savannah *v.* Dehoney, 55 Ga., 33, was a case in which a number of livery-stable keepers filed their bill to enjoin the municipal authorities of Savannah from collecting a license fee or tax on vehicles

for transporting passengers. It was held, for reasons which appear in the opinion, that an injunction was properly granted. Subsequently Feeley, one of the plaintiffs in the case cited, brought suit against the city to recover money which it was alleged he had been compelled unlawfully to pay for license fees for the privilege of running omnibuses. On the hearing the final decree in the case of Mayor *v.* Dehoney was admitted in evidence in behalf of the plaintiff. This was held to be error, and the court, through Chief Justice Jackson, said: "It was an agreed or compromise verdict and decree, and that alone should exclude it; but it was not the same tax, not for the same year, not under the same ordinance, and how much
358 it may have prejudiced the city's case we cannot estimate."

And in Brady *v.* Pryor, 69 Ga. 697, which was not a tax case, it was held, on the authority of Cromwell *v.* County of Sac, 94 U. S. 351, as to the effect of a judgment upon a subsequent action involving the same issues but a different, through similar, subject-matter, "that when an issue is in fact litigated and determined, such determination is conclusive upon parties and privies, in any subsequent action in which the same issue is in question, through the subject-matter of the action be different. But to invoke successfully this rule, it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it was there so involved that it might have been litigated." Somewhat in point also is the case of Worth *v.* Carmichael, 114 Ga., 699, where it was held, that "where two notes were given upon a consideration arising in one and the same transaction, a judgment rendered in favor of the payee against the maker, upon one of such notes, did not operate to estop the latter from setting up, in a subsequent action brought by the former against him on the other note, a defense which was not in issue when the judgment was rendered."

As stated in Anderson's Law Dictionary, p. 157, jurists have found it difficult to define the term "cause of action." It is defined as: "The right which a party has to institute and carry through a proceeding. The act on the part of the defendant which gives the plaintiff his cause of complaint. * * * A wrong committed
359 or threatened." *Id.* "Matter for which an action may be brought." 1 Bouv. L. Dict. 295. "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment." 1 Stroud, Jud. Dict. (2d ed.) 275. See also City of Columbus *v.* Anglin, 120 Ga. 775 (3). If, as indicated by the definition given by Bouvier, the subject-matter of the suit be the cause of action, there is no room for doubt that the present suit is on a different cause of action from the one instituted in the Federal court, except in so far as it seeks to enjoin the collection of taxes for the year 1900; and this view seems to be in harmony with the great weight of authority in tax cases. Identity of principles involved does not give rise to an estoppel by judgment. It may be controlling as precedent in the decision of the later case; but it does not cut the losing party off from a hearing in court. If such were not the case, to adopt the illustration given in the Ken-

tucky case of Newport *v.* Commonwealth, which has already been cited, a man charged under two indictments for exactly similar offenses against the same penal statute would be cut off, after conviction under one indictment, from setting up any defense under the other. Confusion on this subject, we think, is doubtless responsible for the later decisions of the Supreme Court of the United States to which reference has already been made. Our conclusion is that as to the taxes for the year 1900 the Georgia Railroad is now estopped; for all of the grounds of attack now made on the
360 validity of the tax were, or might have been, urged on the trial in the Federal courts; but as to the taxes for the remaining years between 1883 and 1904, inclusive, it may insist upon all of the grounds for injunction contained in its petition.

3. It is contended broadly by counsel for the plaintiff in error that shares of stock in a foreign railroad company, whose line of road lies outside this State, are not taxable in Georgia; and they rest this contention upon the decision in Wright *v.* Southwestern R. Co. 64 Ga. 783, where (p. 799) it was held that stock in railroads without the limits of this State is not taxable here, and that "stock in a railroad is really but so many shares of its property, and that property is real estate, for the most part at least, and taxable by the State in which the road is located." Counsel for the comptroller-general in their brief refer to the language quoted as a "dictum" of Mr. Justice Jackson, who delivered the opinion, and contend that the decision was ill-considered and unsound. It is not contended, however, that the language was *obiter*, or that the question decided was not necessarily involved in the decision of the case. A careful study of the opinion, as well as of the original record in that case, convinces us that the point was necessary to the decision; and however ill-considered, unsound, or unsupported by authority it may have been, it was the solemn judgment of a full bench, having, until
361 overruled by a later decision or altered by legislative enactment, the force of a valid statute. See Heard *v.* Russell, 59 Ga. 54. The decision was not so much one of taxation or exemption; for, as pointed out in the able brief of counsel for the plaintiff in error, the tax act of 1874, with which the decision had to deal, required that all the property of railroads should be taxed; nor (though the language of the opinion might be considered susceptible of a different construction) did it decide that stock of a railroad or other corporation is not property, for at the time the decision was rendered there was in existence a statute, which is still of force, expressly declaring stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, to be personalty. Wright *v.* Southwestern R. Co. adjudicated merely that the situs of stock in a railroad company whose road lies outside the State of Georgia is in the State where the road lies. But by an act approved October 20, 1885 (Acts 1884-85, p. 30), the General Assembly very effectually and emphatically upset the doctrine of that case by declaring (sec. 2) that "personal property shall be construed, for purposes of taxation, to include * * * all stock and securities, whether in corporations within this State or in other States, owned

by citizens of this State, unless exempt by the laws of the United States or of this State." It follows that if this act was valid and binding, the doctrine of Wright *v.* Southwestern R. Co. ceased to
362 be the law of this State from the date of its passage.

4. It is insisted, however, that the act of 1885, was unconstitutional, in that it contained matter different from that expressed in its title, and, as persuasive evidence of that contention, it is pointed out that in compiling the Code of 1895 the codifiers left out the second section of the act, though other portions of the act were codified. The title of the act is as follows: "An act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes." The body, so far as it relates to this discussion, has already been set out in the preceding division of this opinion. It is well settled that "provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words 'and for other purposes'." Banks *v.* State, 124 Ga. 15 and cit. The general subject-matter embraced in the title of the act now under consideration is to provide for the correct returns for taxation of the property in this State. Certainly the ascertainment of what constitutes different classes of property, so as to facilitate the making of correct returns, is germane to that general subject-matter; and we do not hesitate to hold that the attack made upon the constitutionality of the act is without merit.

363 5. It is further contended, however, that by reason of the fact that this section of the act of 1885 was not incorporated in the Code of 1895, it has been repealed by implication; and in support of this position the cases of Central R. Co. *v.* State, 104 Ga. 831, and Barnes *v.* Carter, 120 Ga. 895, are cited. Those decisions merely hold, as was inevitable, that by the adoption of the Code of 1895 all prior *conflicting* laws were repealed by implication; but they do not go to the length of holding, nor do we know of any authority to that effect, that by the adoption of the code any previously adopted valid and constitutional law, not in conflict with anything contained in the code, was wiped out. It would indeed be an extreme view to hold that the codifiers, whose duties do not require them to pass on the constitutionality of legislation, might, because they considered a certain law constitutional, or even through mere oversight, by omitting it from the code put at naught the solemnly expressed intent of the legislature; and it would be equally illogical to hold that the enactment of a code of laws carried with it by implication the repeal of other valid laws in complete harmony with the contents of the code. As the second section of the act of 1885 is not in conflict with any of the laws enacted in the adoption of the Code of 1895, we rule that it is still the law of Georgia.

364 6. There is no arbitrary classification of shares in a foreign railroad corporation for taxation in this State. Shares in domestic corporations are taxed, not in the same manner, but to a like extent with shares in foreign corporations. They are taxed in-

directly, through the taxation of the corporation. It is the aim of the State to tax these shares once only in this State—in the case of domestic corporations they are taxed through the medium of the corporate property, while in the case of foreign corporations, where the corporate property cannot be reached, the shares themselves are directly taxed. That this is lawful, and is not a denial of the equal protection of the laws guaranteed by the constitution of the United States, is abundantly established by authority. Kidd *v.* Alabama, 188 U. S. 730; Wright *v.* Louisville & Nashville R. Co. 195 U. S. 219.

7. Nor is this system of taxation in violation of the provision of the Georgia constitution that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." This question was squarely decided adversely to the contentions of the railroad company in the case of Wright *v.* Louisville & Nashville R. Co., 195 U. S. 219, and the reasoning of Mr. Justice Holmes, of the Supreme Court of the United States, on that subject,
365 seems to the writer in every way convincing. The case of Burke *v.* Badlam, 57 Cal. 594, is also very strong authority for the position I now take. In that case it appeared that the constitution of California contained provisions very similar to those in our own constitution in regard to taxation. By the organic law "stocks" and "franchises" were declared to be included in the definition of the word "property," and it was provided that all property should be taxed in proportion to its value. It was held that when the corporate property of a company was taxed, this was in effect a taxation of the stock of the corporation also, and that the stock was not liable for separate and additional taxation. Said Ross, J., who delivered the opinion: "What is the stock of a corporation but its property—consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—its franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the constitution is complied with." But, it is argued, applying this reasoning to the case in hand, the property of the Western Railway of Alabama is taxed in the State of Albaama, and to subject the shares of stock to taxation in Georgia is to place upon the owner of the shares the burden of double taxation. The answer to this argument, as is pointed out in the case of Wright *v.* Louisville & Nashville R. Co., *supra*, is that the Georgia authorities
366 are bound to tax all property found in Georgia; the shares of stock in the foreign corporation are property, and therefore must be taxed; the corporate property not being situated in Georgia, and it being impossible, therefore, to tax the stock through the medium of the corporate property, the only thing left to the Georgia authorities is to tax the stock directly, as is done in the present case. The Georgia authorities have exacted no double taxation. The fact that Alabama has placed upon the corporate property a tax may

work a hardship upon the holder of the stock, but it is not a reason why the mandate of the constitution that all property within the limits of the State not exempted shall be taxed should be disobeyed or disregarded.

A majority of the court, however, do not think that a decision as to the taxability of domestic stock is necessary in this case. This view is as follows: The constitution declares all property subject to taxation, except such as the General Assembly is therein specifically permitted to exempt. It is not necessary to decide whether shares of a domestic corporation in the hands of a stockholder are required to be taxed as such, in order to comply with the uniformity clause of the constitution. If it is necessary to tax them as such, there is no statute of which we are aware which has the effect to prevent the collection of the tax. Nor are we called upon to decide whether, if domestic shares are taxable, it would be double taxation to assess them for taxation in the hands of the shareholder
367 and also include them in the return made by the president of the corporation as provided by law, and therefore, if the demands of the constitution would be satisfied by the indirect tax of the shares in the assessment on the corporate return. The precise question presented in this phase of the matter is, whether the uniformity clause is offended by the imposition of a tax on foreign shares. The constitution, with regard to declaring what property is liable for taxation, is self-executing. If the legislature, in the scheme for levying and collecting taxes, does not exempt or attempt to exempt property constitutionally liable for taxation, it is no objection that the tax levy is not uniform on the subjects of taxation because in the administration of the law certain property may escape taxation because of the delinquency of the tax officers.

8. In further support of the contention that in the levy of these taxes the railroads were denied the equal protection of the laws, it was claimed that only the Georgia and Central Railroads had been proceeded against for back taxes on shares in non-resident corporations, and that other owners of such foreign shares were not required to pay either present or past due taxes thereon. In support of this claim affidavits of some forty tax-receivers of different counties in the State were introduced in evidence to show that during their respective terms of office the owners of shares of stock in foreign corporations residing in Georgia had not returned said stock
368 for taxation, and that it had been the uniform practice of the tax-receivers not to require them to return such stock. The record discloses that "it was admitted that the Georgia Railroad and Banking Company and the Central of Georgia Railway Company were the only persons owning foreign railroad stock proceeded against for taxes on these kinds of shares. The comptroller-general's statement that he knew of no other delinquent was also admitted." Certainly on this showing the court below was authorized to find that there had been no such unequal and discriminating administration of the taxing laws as to amount to a denial of the railroad companies in question of the equal protection of the laws. Affidavits from tax-receivers of less than one third of the counties of the State,

coupled with an admission that the comptroller-general had proceeded against the only delinquents who had been brought to his notice, certainly cannot be said to establish that the policy of the State has been and is to single out these two railroads, or railroads as a class, as the only citizens who are to be required to pay taxes on shares of stock in foreign corporations. Clearly there is no merit in this contention.

9. On January, 27, 1905, the comptroller-general wrote to the president of the Georgia Railroad and Banking Company the following letter: "The Supreme Court of the United States having recently held, as you doubtless are aware, that the shares of stock of
369 the Western Railway of Alabama owned by the Georgia Railroad and Banking Company are taxable in Georgia, it becomes my duty to assess these shares of stock for taxation for each of the years in which they are in default for their taxes. This assessment is required to be made by the comptroller-general from 'the best information obtainable.' I desire to proceed to the discharge of this duty intelligently, and therefore respectfully request you to furnish me any data in your possession which will enable me to make perfectly fair, just and legal assessments of this property. From your long connection with the property as President of the Georgia Railroad and Banking Company, and your familiarity with its value, you doubtless are in possession of information which will very greatly aid me in making an equitable assessment of the property. I trust, therefore, you will submit at your earliest possible convenience any facts or suggestions bearing upon this line which you may deem proper. I would be glad to have any data which you may submit with reference to its value for each year beginning with the year 1883, the year I am informed your corporation became the owner of these shares of stock. I expect to proceed with this matter some time the early part of next week if possible." Other correspondence took place between the comptroller-general and various officers of the Georgia Railroad, including the general counsel, who eventually submitted to the comptroller-general
370 a statement regarding what he considered the value of the railroad property in question, together with a tabulated statement of the dividends which the Georgia Railroad had received from the stock, at the same time protesting that the stock was not liable for taxation, and refusing to make any return of it for that purpose. The comptroller-general thereupon, according to his affidavit, "assessed the same from the best information obtainable." It is insisted with great earnestness and ability that the levy of executions under these circumstances, without giving notice to the railroad company or allowing it any opportunity to be heard as to the basis of valuation upon which the assessment was made, amounted to a seizure of its property without due process of law. It is not claimed that the comptroller-general has violated the provisions of any existing statute, but that the laws of Georgia do not provide for the collection of taxes on omitted property after a return has been made by the taxpayer and accepted by the comptroller-general.

The Political Code, § 812, prescribes the method by which

"corporations, companies, persons, agencies, or institutions" shall make returns of their property to the comptroller-general for taxation, and provides that "such returns shall be carefully scrutinized by the comptroller-general, and if in his judgment the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of * * * matters required to be returned as aforesaid, below the true amount, or false in any
371 particular, or in any wise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators, * * * and their award shall be final."

Section 813 is as follows: "In cases of failure to make return, the comptroller-general shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions." By section 814 it is provided that "In all cases of default of payment of taxes upon returns or assessments, the comptroller-general shall enforce collections in the manner now provided by law." "If any corporation, company, person, agency, or institution, who are required to make their returns to the comptroller-general, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the State treasury, the comptroller-general shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties." § 874. "When there is no return by which to assess the tax, the comptroller-general shall, from the best information he can procure, assess in his discretion." § 879. These sections of the Political Code are thus set out in order that we may have before us at the outset
372 the various statutes bearing on the power of the comptroller-general to collect taxes on property which has not been returned. And at this point we will take occasion to say that in our opinion all considerations of the good faith of the railroad company should be eliminated from this discussion. It may be conceded that the officials of the company honestly believed that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia Railroad's ownership of it, or to deceive the comptroller-general in any way. In no jurisdiction has the maxim *"ignorantia legis neminem excusat"* been more rigidly applied than in Georgia. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary furnishes no excuse for non-payment. The sole question now to decide is, whether or not the steps taken by the comptroller-general to enforce the collection of the tax are legal.

A question of vital importance is whether sections 813 and 874, entitled respectively, "When no return, comptroller to assess," and

"Defaulting corporations," have reference only to a total failure on the part of the citizen to make a return, or extend to cases where there has been a return which only partially sets out the property of the taxpayer. The latter contingency is certainly not covered by section 812, which has reference, not to an incomplete re-
373 turn, but to an insufficient valuation by the taxpayer. It must be borne in mind that tax laws are to be construed liberally in favor of the power of the State to tax. 27 Am. & Eng. Enc. L. (2d ed.) 699 and note; Board of Commissioners *v.* Anderson, 68 Fed. 341. In our opinion the only rational construction to be placed on sections 813 and 874 of the Political Code is that they cover as well a partial as a total failure to make returns. Any other construction would lead to a manifest absurdity, and would place the State at the mercy of the taxdodger, who, by returning at its full value a mere tithe of his property, would thus escape taxation on the bulk of his estate.

10. The same reasoning is applicable to the contention that by an acceptance of the return on the part of the comptroller-general the transaction is closed, and cannot be reopened by the taxing officers. Such a holding would place a premium on deception, would deny the right of the State to correct mistakes for which its officers were not responsible, and would, in effect, give to the acceptance of a tax return the solemn and binding effect of a judgment fixing the amount of taxable property owned by the taxpayer. "An assessment is not a judgment within the doctrine of *res judicata*, and does not bar or estop a supplemental assessment of property which was, in fact, erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, holding it to be exempt." 27 Am. & Eng. Enc. L. (2d ed.) 701;
374 Sturgis *v.* Carter, 114 U. S. 518. Whatever may be the binding effect of the acceptance of returns by the tax officer in a matter involving judicial action (24 Am. & Eng. Enc. L. 723), it cannot be claimed that the ascertainment whether the returns accepted embrace all the property owned by the citizen is a judicial act. The fallacy of the "closed book" theory is shown, we think, by section 855 of the Political Code, which provides that "Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest." It is true that this section in terms refers only to tax-receivers and tax-collectors, and does not mention the comptroller-general of the State. But it must be borne in mind that the section was enacted into law in 1813, at a time when the comptroller-general was merely an auditor of public accounts, and had no powers as a taxing officer, and when all taxable property of every kind was returned to the tax-receiver and collected by the tax-collector. In 1861, for the first time, the comptroller-general was made a tax officer; and it is only reasonable to assume that in delegating to him certain duties which had theretofore been performed by the county officers, the General Assembly intended that he should be

clothed with the same powers as they for the complete and
375 efficient discharge of those duties, so far as applicable. If we are correct in this reasoning, the language of Judge McCay in his concurring opinion in the case of Walker *v.* Whitehead, 43 Ga., 551, 552, furnished an irresistible argument for holding that the comptroller-general is not concluded by the acceptance of returns from making a subsequent assessment for omitted property. Discussing what is now section 855 of the Political Code, it was said: "That (the taxes) were due five, four, three and two years ago, and have gone unpaid, is no relaxation of the obligation to pay them. Can it be contended that, because one in 1866 or 1868 managed to conceal his taxable property, he is thereby released from his obligation to pay the tax thereon when he finds it no longer possible to hide it? * * * These taxes are just as much due now as they were in the year they were incurred. They are a present, subsisting, legal obligation, and if the remedies provided at the time have proved inadequate to enforce their payment, the State may take any new remedy that may suggest itself * * * The duty to pay exists *now*, it is a continuing, present obligation and duty, just as imperative today as it was last year. The 866th section of the Code (now Pol. Code, § 855) provides how taxes for previous years shall be given in and paid, and one who today fails to give in and pay taxes upon property not given in and paid in former years, fails in a *present* duty, and it is perfectly competent to affix a penalty on him, not for his past, but his present and future failures."

376 Again, by the act of 1813 (Pol. Code, § 847), it is provided that if a person fails to make a return, in whole or in part, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain; while by the act of 1804 and its amendments (Pol. Code, § 949, par-. 2, 11), it is made the duty of the tax-collector "to search out and ascertain as far as possible all polls and professions, and all taxable property not returned to the receiver or not found in his digests," and "to issue executions against all tax defaulters who are residents of the counties in which said tax collectors are holding their offices, for any and every year preceding and including the years for which they are elected, and to collect the tax due from said defaulters, and pay over the same to the proper authorities." Reading together the provisions of sections 847 and 949, and all of the provisions of the Code on the subject of the collection of taxes, the conclusion is necessarily reached that there was a legislative intent to clothe the comptroller-general as a tax-receiver and collector with all the powers of the county receiver and collector, wherever applicable to his duties in these capacities, whether the law conferring these powers was in force when the comptroller- general first became a tax officer, or were thereafter enacted.

377 11. The Georgia law affords to every citizen, individual or corporation, ample facilities for the preservation of his rights as against the tax-gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes

that the taxpayer will disclose to the officer all of his taxable property, and it requires him to know whether his property is taxable or not. The requirement of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity to dispute with the State the question of the value of his property and the amount of tax to be levied thereon. When he fails to return, in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have the mutual rights between himself and the taxing power adjusted by arbitration is concerned. In other words, ample "machinery" is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection. This, it seems to us, is the scheme of taxation contemplated by the laws of this State. Whether or not it is consistent with a wise public policy we do not undertake to determine. That it is not un-
378 constitutional we are fully satisfied. 1 Cooley on Taxation, 619–624, and cases cited in notes. Board of Commissioners *v.* Anderson, 68 Fed. 341; Lott *v.* Hubbard, 44 Ala. 593; McMillan *v.* Carter, 6 Mont. 215, s. c. 9 Pac. 906; Orena *v.* Sherman, 61 Cal. 101; Tucker *v.* Aiken, 7 N. H. 113; City *v.* Champion, 58 Conn. 268, s. c. 20 Atl. 471; McTwiggan *v.* Hunter (R. I.) 29 L. R. A. 526; Board of Revenue *v.* Montgomery Gas Light Co., 64 Ala. 269; Wabash R. Co. *v.* Johnson, 108 Ill. 11; Siegfried *v.* Raymond, 190 Ill. 424; Goodman *v.* Halter (Ind.) 47 N. E. 665; Hagar *v.* Reclamation District, 111 U. S. 701; Pittsburg R. Co. *v.* Backus, 154 U. S. 426; Du Bignon *v.* Brunswick, 105 Ga. 317.

12. As we have seen, the comptroller-general in making his assessment was only obliged to use "the best information he could procure" as the basis of his valuation of the property taxed. There is nothing in the record to indicate that upon that basis the valuation placed upon the shares by the officer was excessive.

13. It cannot avail the railroad company that during all the years for which the tax now under consideration was levied it had issued annual statements showing its possession of the shares of stock now sought to be taxed, and that the comptroller-general might have ascertained from these statements, which were easily accessible to him, the Georgia Railroad's ownership of the shares. "Estoppels against
379 the State are not favored; and though they may arise from its express grants, they cannot arise from the laches of its officers, since persons who deal with an officer of the government are bound to know the extent of his power and authority." Lott *v.* Brewer, 64 Ala. 287.

14. In the absence of a statutory provision to that effect, taxes do not bear interest. State *v.* Southwestern Railroad, 7 Ga. 32 (8). Section 887 of the Political Code, providing for the payment of interest on tax *fi. fas.*, was not approved until November 11, 1889, and consequently the comptroller-general cannot lawfully exact interest

on taxes accrued prior to that time. Under the statute cited the interest dates, not from the time of the issuing of the *fi. fa.*, but "from the time fixed by law for issuing the same." "Such interest is not in the nature of a penalty." Sparks *v.* Lowndes County, 98 Ga. 284.

15. The assessment made on the stock for the year 1883 (which was identical with those made for the other years involved in this litigation, except as to dates and amounts) was in the following language: "Whereas The Georgia Railroad and Banking Company, a corporation chartered under the laws of Georgia and doing business in this State, having failed and refused to return for taxation for the year 1883, 15,000 shares of stock of the Western Railway of Alabama, an Alabama corporation, said stock being then held and owned by said Georgia Railroad and Banking Company, in this
380 State, and having failed and refused to pay the taxes due the State thereon for the year 1883 as required by law, I hereby assess the said 15,000 shares of stock of the Western Railway of Alabama for said year as being then of the value of $1,350,000.00. Said assessment being made by virtue of authority vested in me by law as Comptroller General, 'from the best information I can procure.'"

In the light of what we have held in a preceding division of this opinion in regard to the contention of the plaintiff in error that the levy is a seizure of its property without due process of law, it is only necessary to add that the assessment which has been quoted showed every jurisdictional fact necessary to authorize the comptroller-general to proceed thereunder.

16. It is insisted by counsel for the plaintiff in error that in the years 1903 and 1904 the Georgia Railroad actually made a return of the stock owned by it in the Western Railway of Alabama, though under protest, and that this being so, the comptroller-general had no right, until after compliance with the provisions of the Political Code, § 812, to increase the amount of the return. As it appears from the record, however, that this so-called "return" was merely a statement "for the purpose of furnishing the office of the comptroller-general with information sought by said office, and not for the purpose of making a return of property for State taxation," there is obviously no merit in this contention.

381 17. But it is urged that the claim of the State for these taxes is barred by the statutes of limitation; and this contention is based on several different grounds. The Civil Code, § 3777, provides that "When, by the provisions of the foregoing sections §§ 3760 to 3776 inclusive), a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances." This section became a part of the law of Georgia in 1856 (Acts 1856, p. 237). Up to that time the *maxim nullum tempus occurrit regi* obtained in Georgia. Brinsfield *v.* Carter, 2 Ga. 143; Moody *v.* Fleming, 4 Ga. 116 (7); Smead *v.* Williams, 6 Ga. 159. The act of 1856 is plainly in derogation of the common law and of the rights of the State, and, under the well-established rules, must be given a strict construction. In terms it is limited to the "foregoing sections," that is, the preceding sections of the chapter

relating to the general subject of limitations; and therefore it will not be extended to bar the right of the State to any actions not provided for by those sections of the code.

18. But it is contended that section 3775 is applicable to this case, and that by the terms of section 3777 the State is barred by the provisions of the section first mentioned. That section is as follows: "The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equi-
382 table bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights." This contention is plainly founded on a misconception of the equitable doctrine of stale demands. The principle that a stale demand will not be enforced is peculiarly applicable to equity practice, is available to the defendant only, and cannot be employed by the complainant in an equitable proceeding to enjoin the enforcement of a purely legal right. Indeed, by the terms of the statute cited, it is restricted to cases where the "complainant" has been guilty of laches and time has elapsed to make his claim inequitable. See also Bisph. Pr. Eq. (6th ed.) § 39.

19. Section 3768 of the Civil Code is also pleaded in bar of the State's right to collect these taxes. That section is as follows: "All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied *assumpsit* or undertaking, shall be brought within four years after the right of action accrues." The principal authority relied on by counsel to support the contention that this section covers a claim by the State for taxes is the case of Bristol *v.* Washington County, 177 U. S. 133, 148. That case went to the Supreme Court of the United States from Minnesota, and was decided on the authority of the case of County of Redwood *v.* Winona Land Co., 40 Minn 512 (also cited as State *v.* Lands in Redwood County,
383 42 N. W. 473), in which case the Minnesota court held that by statute in that State the statute of limitations ran against the State the same as against an individual; that a tax was a liability created by statute, and that under a law providing that actions upon a liability created by statute should be barred after six years the State could not put in motion the legal machinery provided by statute for the collection of back taxes after that time. There is a vast difference, however, between a liability created by statute and an open account, a contract not under the hand of the party sought to be charged, or an implied assumpsit or undertaking. The statute passed upon by the Minnesota court, and later by the Supreme Court of the United States, is more closely analogous to section 3766 of our Civil Code, which provides that "all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues;" and if that section were before us for construction, the cases cited would be very strong authority for the proposition that the State's claim for taxes will be barred after the lapse of the period therein mentioned. In view of the fact, however, that we have already decided, independently of statutes of limitation, that the tax involved in this case cannot be collected except for

a period of less than twenty years prior to the institution of this action, any ruling with reference to section 3766 of the Civil Code would be *obiter*, and manifestly out of place. Nevertheless, the writer will take occasion to say that his personal opinion is
384 that under section 3766 of the Civil Code, read in connection with section 3777, and on the authority of the cases of Bristol *v.* Washington County, 177 U. S. 133, and State *v.* Lands in Redwood County (Minn.) 42 N. W. 473, the State is barred of its right to collect back taxes after the lapse of twenty years.

Taxes, however, are not debts within the meaning of the Civil Code, § 3768. "A tax, in its essential characteristics, is almost universally held not to be a debt or in the nature of a debt. The distinction between a debt and a tax is that the one rests on contract and the other does not. A debt is a sum of money due by contract, express or implied, while a tax is a charge on person or property to raise money for public purposes, and operates *in invitum*." 27 Am. & Eng. Enc. L. (2d ed.) 580, and cases cited in note. See also Du Bignon *v.* Brunswick, 105 Ga., 325. With this distinction clearly in mind, we think there can be no doubt that section 3768 of the Civil Code does not raise any bar to the right of the State to collect back taxes.

20. Finally, sections 890 and 891 of the Political Code are relied on to bar the collection of taxes for more than seven years. My views on this subject are hopelessly at variance with those of a majority of my brethren. I incorporate herewith their views, and will then endeavor to make clear my reasons for dissenting therefrom.

385 "That invisible person, or power, or being, or entity, no matter what it may be called, which for convenience, under our system of government, we call the State, was endowed in the beginning of republican institutions with many of the attributes of the visible king whose authority to rule was supposed to have its origin in divine right. The maxims that no time runs against the king, and that the king can do no wrong, were applied to the invisible ruler of modern institutions with somewhat the same force and rigor with which they were applied to the king of the olden days. But that which we call the State is also properly called the public and the people, and the invisible ruler becomes visible by simply opening the eyes to that mass of individuals with whom government originates and through whose representatives government is carried on. The State, that is the public, the people, the ideal sovereign of the more enlightened days of the world, in the steady recession from the selfish, not to say atrocious theory, that the subject exists for the benefit of the sovereign, and the latter has rights before which the interests and welfare of the former must pale and vanish, —in the steady advance of the revolution of thought that government is subordinate to the people, and instead of being their master is their servant, the State has voluntarily come under the operation of the statutes of limitation wholly and unreservedly in nearly every instance where such statutes are applicable to individuals.

386 "The general rule is that where an individual would be barred by a statute of limitation the State is likewise barred,

under the same circumstances. The exceptions to this rule are few in number. The question now is whether the mere naked claim of the State for taxes which it has not sought to enforce by execution is barred by any statute of limitation. If the State has attempted to enforce its claim for taxes by execution, that the execution would become barred in the same time and under the same circumstances that an execution issued under an ordinary judgment would be barred is beyond question. Acts 1887, p 23; Pol. Code § 890. The section of the code just cited provides: 'All State, county, city, or other tax *fi. fas*, before or after legal transfer and record, shall be enforced within seven years from the date of their issue; or within seven years from the time of the last entry upon the tax *fi. fa.* by the officer authorized to execute and return the same, if said entry is properly entered by said officer upon the execution-docket and books in which said entries are now required to be made in cases of entries on executions issued on judgments.' The section immediately following is in this language: 'All laws in reference to a period of limitation as to ordinary executions for any purpose, or to the length of time or circumstances under which they lose their lien in whole or in part, are made applicable to tax *fi. fas.*'. Pol. Code, § 891. We recognize the rule of construction that statutes derogatory to the sovereign right of the State shall be construed
387 strictly in favor of such right, and that a statute imposing upon the State a limitation as to its sovereign right which is doubtful in meaning or equivocal in its terms must be so construed as to uphold the right and defeat the limitation upon its power. The State surrenders its sovereign right only by express enactment or necessary implication. It is therefore to be determined whether the legislative intent in the act of 1887 was to destroy the right of the State to claim a tax lien against the citizen after the lapse of a given time, or whether it was intended to destroy the mere process that might have been issued and leave a lien for taxes still existing for all time when no execution had ever been issued, to enforce it.

"Statutes of limitation are statutes of repose. They are intended to relieve against the hardships inevitably incident to the enforcement of demands of long standing, when the lapse of time would necessarily place the person against whom they are enforced at a disadvantage as to their defences. In interpreting the act of 1887, the purpose of such a statute must be kept prominently in view. Construing this act as a whole, its language indicates that the purpose of the lawmaking power was to place the State in regard to its claim for taxes in the same position that a plaintiff in a judgment would be placed as to the enforcement of a right upon which a judgment was founded. While the statute uses the word 'execution' and not the word 'judgment,' there can be no legitimate escape from the conclusion that the legislative intent was to bring the tax
388 judgment of the State within the dormant-judgment law applicable to cases of individuals. The entries required to be made on tax executions are entries similar to those required to be made on 'executions issued on judgments.' That the word

'execution' is to be interpreted in the sense of judgment becomes clear when we refer to the statutes evidently referred to by the expression, 'All laws in reference to a period of limitations as to ordinary executions.' The only law to which this expression can apply is the dormant-judgment act embraced in the Civil Code, § 3761, the effect of which is to destroy the lien of the judgment upon which the execution is based by a failure to enforce the execution, and not merely to destroy the execution itself. That section is in the following language: 'No judgment shall be enforced after seven years from its rendition, when no execution has been issued upon it and the same placed upon the execution docket, or when execution has been issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, or the last entry upon the execution, made by an officer authorized to execute and return the same. Such judgments may be revived by *scire facias*, or be sued on within three years from the time they became dormant.' Unless this is the section referred to, section 891 of the Political Code is meaningless, because there are no laws in this State in reference to a period of limitation as to ordinary executions, but there is the law
389 above quoted which is a period of limitation as to ordinary judgments. While it is to be conceded that the act of 1887 does not in terms declare that the judgment in favor of the State for taxes shall become barred, it is necessarily implied; and unless this implication is allowed to operate, the second section of the act is without meaning, and this anomalous situation arises; that the State is barred where its officers do their duty and issue their executions within due time, but fail to have entries made thereon from time to time as required by law, but the State is not barred when there has been either a negligent or a wilful failure on the part of the public officers to discharge their duties under the law. That part of section 3761 which declares that no judgment shall be enforced after seven years from its rendition, when no execution has been issued thereon, is by necessary implication a part of the act of 1887, and hence when the State has failed to issue an execution for taxes within seven years after the time for the issuing of the execution has arrived, the claim of the State for taxes is barred, and barred for the reason that in this particular the act of 1887 brings the judgment of the State for taxes within the full operation of the dormant judgment act. See in this connection, Staten *v.* Railway Co. 111 Ga., 803 (2). For reasons satisfactory to the General Assembly the right of the individual to have a dormant judgment revived within three years after dormancy has not been made a part of what we might properly call the dormant-tax-judgment act.
To allow the State after the lapse of seven years to enforce by
390 execution a claim upon a judgment for taxes upon which no execution had been issued would be as antagonistic to the law as to allow an individual to sue on a note under seal upon which a judgment had been rendered and had become barred within less than twenty years simply for the reason that the original period of limitation applicable to sealed instruments had not expired at

the time the judgment had become dormant. The analogy between the two is not altogether perfect, but it exists sufficiently to illustrate the anomaly resulting from the construction sought to be placed upon the act of 1887.

"There is no question of fraudulent concealment of property involved here. The same reasoning, that the lapse of four years did not bar the enforcement of taxes because the statute referred to suits, would likewise apply to section 3766, which reads that 'all suits for the enforcement of rights accruing to individuals under statutes,' etc. shall be barred within twenty years. Moreover, under the peculiar language of section 3766, and the construction put upon it by this Court in Bigby *v.* Douglas, 123 Ga. 635, and in Savannah Canal Co. *v.* Shuman, 98 Ga. 171, it would seem not applicable here. In some courts it has been held that suits or proceedings in the nature of suits to recover taxes are like actions to enforce statutory rights, and should be barred accordingly, even though taxes be not mentioned in the statute at all. See what is said in the authority referred to by Mr. Justice Candler, County of Redwood *v.* Winona Land Company, 40 Minn. 525-6. If the bar does not attach
391 either in four years or twenty years, then it either attaches to the enforcement of taxes by execution under the Political Code, §§ 890, 891, as to property alleged not to have been returned, or else no statute of limitations applies at all. If no statute applies, then there is no limit beyond which the comptroller-general or tax-collector may not go in issuing *fi. fas.* It is not a mere question as to the taxes of this corporation. The amount involved in this case is of small importance compared to the establishment of correct rules of law as to taxpayers. Every property owner in the State is subject to taxation; and if the tax-collector can go backwards without limitation, and declare that any taxpayer owned certain property at a given date and failed to return it, assesses its value from the best information he can obtain, adding interest, and issue executions therefor, it presents a serious question for all the taxpayers of the State. If any other construction were made than that which we give to the statute, few men in the State could feel safe that the titles to their homes and lands might not be subjected for some omission (accidental or intentional) from the tax returns of some former owner (many years ago perhaps), for which no claim had been made, and no execution issued. Liens attach for taxes, not from the date of the execution, but from the tax day fixed by law. A sale to an innocent purchaser even does not divest them. The former owner might have honestly believed the property not returned was not subject to taxation, but this would not save the present
392 owner, unless there is some limitation.

"A construction which would place no limitation upon the right of the tax-collector to issue and enforce *fi. fas.* would mean public disaster. Tax is a valuable and necessary thing for the State, but the security of the citizen is also good. There may be 'tax dodgers,' and men who defraud the government, but tax liens affect the honest as well as the dishonest. Without irreverance the State

in general laws seek to follow the Divine example, when it is said: 'He maketh his sun to rise on the evil and the good, and sendeth rain on the just and unjust.' The laws of this State taxing property are uniform. Of course, if the law is plain, we must administer it and not change it, whatever may be the result. But it is well recognized that in construing a statute the court may look to the old law, the mischief, and the remedy; and with this in view, the legislative intent in making the laws relating to ordinary executions and judgments becoming dormant, applicable to tax executions, should be considered. If the law is not clear, the reasonableness or unreasonableness of a particular construction is a legitimate subject for consideration. Lombard v. Trustees, 73 Ga., 322; Moravian Seminary *v.* Atwood, 50 Ga. 382; 26 Am. & Eng. Enc. L. (2d ed.) 646. Is it reasonable to suppose that the legislature meant to protect purchasers only if the tax-collector had done his duty and issued executions, but left them in danger and with an overhanging lien, for an unlimited time, if he did not issue an execution? True there is no intervening purchaser here. But under the statute there is no distinction, and if there is no bar as to the defendant, there is none as to a purchaser, however honest. Furthermore, the legislature has declared that interest against a taxpayer runs from the time when an execution should have been issued, and this has been construed to mean December 20, of each year. Surely the State did not intend to fix a date when its officer should have issued the execution as a point from which interest should run against a taxpayer, but not from which the statute of limitations should run in his favor. Doubtless the legislature considered the serious consequences resulting from thus leaving the matter open for action by the tax-collector indefinitely, when they passed the act of 1887, embodied in the sections of the Political Code cited above. If this be not the correct construction, in examining titles no lawyer could give his client any assurance that he would obtain a clear title; for if there were no limitation, the danger would go back to the beginning of the taxing system.

393

"The constitutional prohibition against granting away the right of taxation (Civil Code, § 5796) has no relevancy, we think, to the case. The constitution prohibits the grant of privileges and exemptions (except as specified) to corporations and other persons. It says nothing of the time when the execution must be issued or enforced. The legislature has passed many acts prescribing the time within which actions may be brought, but these were not considered unconstitutional violations of property or property rights. A similar question has been passed on by the Supreme Court of Montana, in Board of Commissioners *v.* Story, 69 Pac., 56."

394

With the greatest respect for the profound ability and learning of my brethren, I am constrained to register a very earnest dissent from the view above expressed. Their vigorous attack upon the inherent fallacy of the obsolete doctrine of the divine right of kings, and the scholarly narrative of the evolution of human thought re-

sulting in the rejection of this fallacy by advanced and enlightened nations, are both entertaining and instructive; but I fail to see that they illuminate the subject under discussion. It is freely conceded that the theory that the subject exists for the benefit of the sovereign is both "selfish" and "atrocious,"—it might be even more strongly characterized. I must insist, however, that this theory is not even remotely kin to the one that the right of self-preservation is inherent in the State, be it republican or monarchical in form, and that growing out of this right as a necessary incident thereto is the right to tax the citizen for the support of the government. "The right of taxation is a sovereign right inalienable, indestructible,—is the life of the State." I do not contend for the divine right of kings, but for the inherent, if not divine, right of the State (*i. e.*, the people) to protect and perpetuate itself. The right to tax cannot be abridged or restricted in any degree without the consent of the State,
395 and that consent must be so plainly expressed *to* to leave no room for doubt. I dispute the theory announced by the majority that "the general rule is that where an individual would be barred by a statute of limitations the State is likewise barred under the same circumstances," and contend that the exception has been stated instead of the rule.

In my opinion, section 891 of the Political Code was designed to render tax executions dormant in the same manner that executions issued on judgments become dormant. I agree with the contention of counsel for the State that the purpose of the statute is to protect innocent and *bona fide* purchasers. Stanley *v.* McWhorter, 78 Ga., 38; Hollis *v.* Lamb, 114 Ga., 744; Easterling *v.* New Home Co., 115 Ga., 309. And I can conceive of no rule of construction by which there can be read into section 891 the meaning that unless a claim for taxes is placed in execution within seven years from the date of its accrual, the State will, by analogy to the case of one who has obtained a civil judgment which has not been placed in execution, lose the right to issue a *fi. fa.* and enforce its collection. The argument that the construction of sections 890 and 891 for which I contend would place a premium on official inaction and allow the State to derive an advantage from the negligence of its taxing officers is to me entirely unconvincing. All presumptions are in favor of the faithful and efficient discharge of their duties by officers. On
396 the other hand, the contrary construction will place a premium on concealment, deception, and tax-dodging, which, in human experience if not in human nature, are evils more to be dreaded and more likely to be encountered than official inaction.

As has been seen, a majority of the court is of the opinion that the State's right to issue execution for taxes is barred after the lapse of seven years from the time when the right to issue such execution accrues. We are, however, unanimous in holding that the statute did not run against the State during the time that the comptroller-general was enjoined by the Federal Court from issuing any *fi. fa.* whatever for taxes on this stock. As will be seen from another portion of this opinion, the only question necessarily involved in the

suit in the United States Circuit Court was the taxability of the stock for the year 1900; and to that extent only does the estoppel by judgment operate. But the decree in the case enjoined the issuance of any executions for taxes, not only for taxes for the year 1900, but for subsequent years, and for any year in which the State might see fit to make a claim for taxes on the stock. While neither party is estopped on the question of taxability, except for the year 1900, the hands of the State officers were absolutely tied by the injunction as to the enforcement of any claim for taxes which the State might have. In this litigation the Georgia Railroad and Banking Company was a party; and while it was not a complainant, and
397 did not itself procure the decree, it was a party to the case and was bound by the decree to the same extent that other parties would be bound, and was actually enjoined from returning or paying any taxes whatever on this stock. With the State officers in the situation in which the final decree left them, they would have been in contempt of court if they had attempted to enforce any claim for taxes against this stock in any way for any year. Under such circumstances the plaintiff in the present case cannot in equity ask that the State be barred by a limitation of time, when the time involved is that which passed during the period when the State officers were bound to remain passive as a result of a judgment of a court of competent jurisdiction.

Mr. Justice Lumpkin concurs with me in the conclusion that I have reached, but, as will be seen, some of the reasoning leading thereto conflicts with the position taken by him in his dissenting headnote. 2 (*a*.).

On the main issues of the taxability of the stock in question and the legality of the procedure instituted by the comptroller-general, the court below was right, and therefore the judgment will be affirmed; direction being given, in accordance with the views of the majority, that the comptroller-general and the sheriff be enjoined from seeking to collect any tax on the stock from the plaintiff in error which accrued prior to the year 1895, and that the costs incurred in bringing the case to this court be taxed against the
398 defendant in error.

Judgment affirmed with direction. All the Justices concur, except Candler, J., who dissents as to the direction given.

399 Clerk's Office, Supreme Court of Georgia.

ATLANTA, *August* 11, 1906.

I hereby certify that the pages hereto attached contain the original writ of error and order allowing the same and original citation, and copies of petition for writ of error, bond, assignment of errors, bill of exceptions, transcript of record, and opinion and judgment of the Supreme Court of Georgia in the case therein stated, and also a copy of an opinion of the said Supreme Court in a case between the same parties which is referred to in the opinion first mentioned and is transmitted to the Supreme Court of the United States by authority

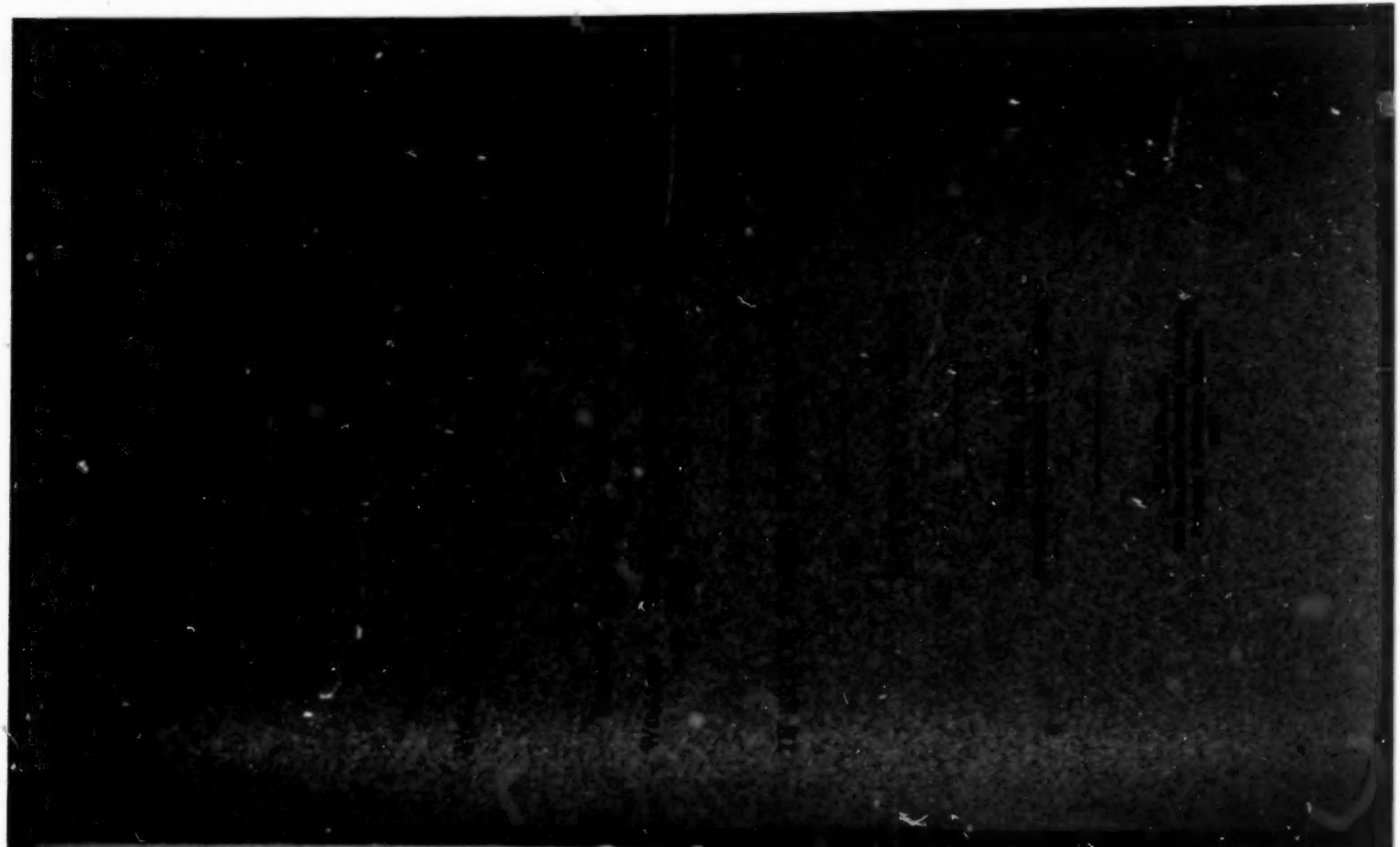
of an agreement between counsel; all of which appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk of the Supreme Court of Georgia.

Endorsed on cover: File No. 20,349. Georgia supreme court. Term No. 384. The Georgia Rail Road and Banking Company, plaintiff in error, *vs.* William A. Wright, comptroller-general of Georgia, and John W. Nelms, sheriff of Fulton county. Filed August 18th, 1906. File No. 20,349.



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY *vs.* WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF.	No. 380.
CENTRAL OF GEORGIA RAILWAY COMPANY *vs.* WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF.	No. 384.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

Notice to Jos. B. Cumming, Jos. R. Lamar and Alex. C. King, attorneys for plaintiff in above stated case, No. 384;

To Alexander R. Lawton and Mayhew Cunningham and Alex. C. King, attorneys for plaintiff in above stated case, No. 380, and to said appellants:

Take notice, that I shall move the Supreme Court of the United States, at the court-room of said court, in the city of Washington, D. C., on Monday, the 14th day of January next, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to advance the above entitled causes for argument, and that upon such motion I shall present to the court in support thereof the statement and reasons hereto annexed.

Respectfully,

JOHN C. HART,
Attorney-General of Georgia.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 380.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 384.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

MOTION TO ADVANCE AND REASSIGN THE ABOVE STATED CASES FOR HEARING, WITH REASONS FOR THE SAME.

Movant respectfully shows to the Court that heretofore, to wit, on the 19th day of November, 1906, a motion was filed to advance the above stated cases, reference to which motion leave is prayed, and after considering the motion the Court granted the same, assigning it to be heard on the 2d day of October, 1907. Movant now, as Attorney-General for the State of Georgia and as counsel for the above named defendants, respectfully beg that the Court, for the reasons hereinafter assigned, will reconsider the date heretofore set for argument and reassign said case to be heard during the month

of March of the present year or as soon thereafter as the business of the Court will allow, for the reason:

FIRST.

The cases involve the taxability of foreign stock under the laws of Georgia, held by citizens of Georgia, and also involves an attack upon the constitutionality of the laws of Georgia under which the Comptroller-General acted in assessing the property in controversy for taxation. The causes involve a large amount of revenue long past due the State, and for a period covering eleven years.

SECOND.

The causes are so similar that they may be consolidated and argued together at the hearing.

THIRD.

The importance of an early hearing of these cases, on account of the financial embarrassment which delay will bring about, is fully expressed in a letter written this department by his Excellency the Governor, which is here referred to and made a part of this motion, as follows:

"*Attorney-General Jno. C. Hart, State Capitol.*

DEAR SIR: I am in receipt of your letter informing me that the tax cases involving a large amount of revenue due this State now pending in the Supreme Court of the United States has in response to your petition been advanced and assigned for argument on the 2d day of October, 1907. I regret very much indeed that the cases have been set at such a distant date. Aside from the amount of money involved, the act of the Comptroller-General in assessing this property is attacked as unconstitutional, and as it is a general law on the subject it is very unfortunate that we can not get the opinion of the Supreme

Court earlier. The State is very much embarrassed financially because of this delay, while the Comptroller-General, the chief taxing officer of this State, is greatly embarrassed in the discharge of his official duties. Do you not think it advisable to call this matter to the attention of the Court and pray for an earlier setting of the cases?

Yours very respectfully,

J. M. TERRELL,
Governor."

FOURTH.

Movant further shows that a branch of the present case has heretofore been heard and disposed of by this Court, to wit, the case of Wright, Comptroller-General, *vs.* Louisville & Nashville Railroad Co. and the Atlantic Coast Line Railroad Co., reported in the 195 U. S. 219, in which litigation one of the present appellants, to wit, the Georgia Railroad & Banking Co., was an original party defendant in the United States District Court for the Northern district of Georgia, but did not join in the appeal to the United States Circuit Court of Appeals for the fifth circuit at New Orleans, Louisiana.

FIFTH.

Movant further shows that the plaintiffs in error are also desirous that the causes be advanced for the reason the amount claimed to be due the State is in shape of an execution, or executions, bearing interest at the legal rate in Georgia, to wit, seven per cent., and if they are liable for the principal they desire to pay up the same and stop interest as early as the fact of final liability may be established.

Wherefore, because of these financial embarrassments to the State of Georgia and to the counties depending upon the revenue involved in these causes, and because of the question of the authority of the Comptroller-General under the law to make assessments against delinquent taxpayers, movant re-

spectfully requests that the Court will reconsider the assignment and set the causes for an earlier date, and thus end the dispute and litigation which has been pending in divers shapes for five years.

Respectfully submitted,

JNO. C. HART,
Attorney-General.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. — No. 380.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. — No. 384.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

We concur in the request to reassign the above stated cases, and hereby acknowledge due and legal service of the above and foregoing motion to advance said cases now pending in the Supreme Court of the United States to be presented to the Court on January 14th, 1907, and copy of the same and all further notice or service is hereby waived, and in the event the motion is not presented to the Court on the said day named, we hereby consent that it may be assigned at such time thereafter as counsel for defendant in error may see proper.

This the — day of January, 1907.

ALEXANDER R. LAWTON,
MAYHEW CUNNINGHAM,
ALEX. C. KING,
Attorneys for Central of Ga. Ry. Co.
JOS. B. CUMMING,
JAS. R. LAMAR,
ALEX. C. KING,
Attorneys for Ga. R. R. and Banking Co.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1906

Office Supreme Court
FILED
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JAMES H. McKEN

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF.

No. [redacted]85.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF.

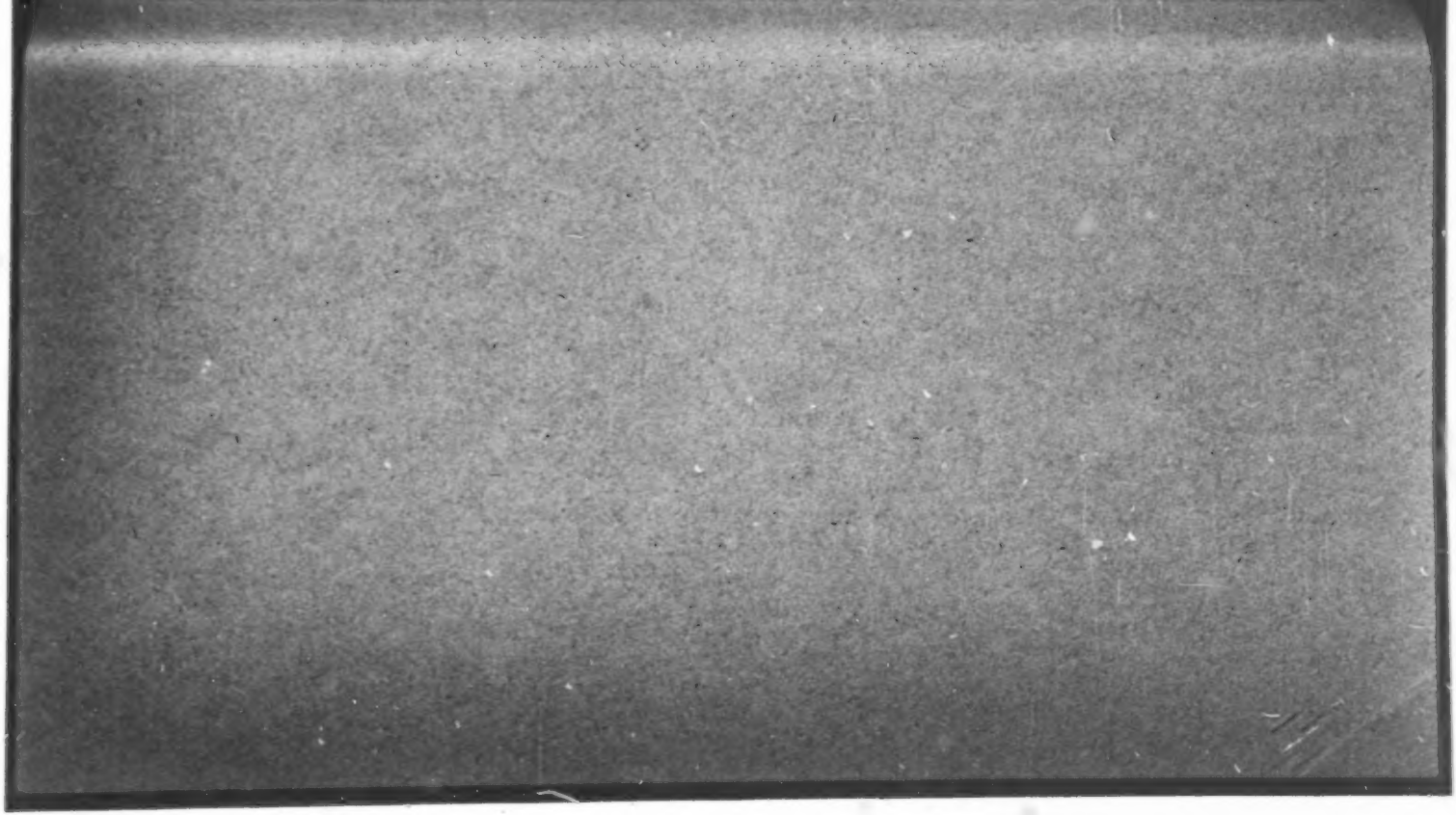
No. [redacted]89.

IN ERROR TO THE SUPREME COURT OF GEORGIA

MOTION TO ADVANCE

JOHN C. HART
ATTORNEY-GENERAL OF GEORGIA

ATLANTA, GA
THE FRANKLIN-TURNER COMPANY
PRINTERS, PUBLISHERS, BINDERS
1906



IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 380.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 384

IN ERROR TO THE SUPREME COURT OF GEORGIA.

Notice to Jos. B. Cumming, Jos. R. Lamar and Alex. C. King, attorneys for plaintiff in above stated case, No. 384:

To Alexander R. Lawton and Mayhew Cunningham and Alex. C. King, attorneys for plaintiff in above stated case, No. 380, and to said appellants:

Take notice, that I shall move the Supreme Court of the United States, at the court-room of said court, in the city of Washington, D. C., on Monday, the 19th day of November next, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to advance the above entitled causes for argument, and that upon such motion I shall present to the court in support thereof the statement and reasons hereto annexed.

Respectfully,

JOHN C. HART,
Attorney-General of Georgia.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 380.

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 384.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

MOTION TO ADVANCE THE ABOVE STATED CASES FOR HEARING, WITH REASONS FOR THE SAME.

Movant, as Attorney-General for the State of Georgia, and as counsel for the above named defendants, Wm. A. Wright, Comptroller-General of the State of Georgia, and John W. Nelms, sheriff of Fulton county, Georgia, respectfully prays the Court to advance the hearing of the above stated causes, and begs leave to assign reasons therefor as follows:

FIRST.

These cases involve the taxability of foreign stock under the laws of Georgia, held by citizens of Georgia, and further attacks the constitutionality of the laws of Georgia under which the assessment is made. The causes involve in a large

amount the revenue of the State and of a number of counties, the sum total amounting to several hundred thousand dollars, and covers the taxes due the State and counties for a period of eleven years.

SECOND.

The Comptroller-General of the State of Georgia, whose official duty requires him under certain conditions to value and assess property, is greatly embarrassed in the present discharge of his official duty because of the pendency of these suits, the contentions of the appellants being that the law under which the Comptroller-General proceeds to assess past due taxes violates the Constitution of the United States in that it does not provide for notice to the delinquent taxpayer, and is a deprivation of property without due process of law.

THIRD.

The property upon which taxes have been assessed are shares of stock owned by appellants in the Western Railway of Alabama, a foreign corporation, each of the appellants owning fifteen thousand shares, and the issue involved is the taxability of this stock to Georgia and the validity of the law under which the assessment was made.

FOURTH.

The above stated causes are so similar that they may be consolidated and argued together at the hearing.

FIFTH.

Movant further shows that a branch of the present case has heretofore been heard and disposed of by this Court, to wit, the case of Wright, Comptroller-General, *vs.* Louisville & Nashville Railroad Co. and the Atlantic Coast Line Railroad Co., reported in the 195 U. S. 219, in which litigation one of the present appellants, to wit, the Georgia Railroad & Banking Co., was an original party defendant in the United States

District Court for the Northern district of Georgia, but who did not join in the appeal to the United States Circuit Court of Appeals for the fifth circuit at New Orleans, Louisiana.

SIXTH.

Movant further shows that executions have been issued in favor of the State of Georgia against the complainants for these past due taxes, which executions are interest-bearing, and appellants are anxious to discontinue this interest by payment of the principal so soon as their liability for these taxes is definitely determined, while the State and counties, on account of their present needs, greatly prefer the amount due them now.

Wherefore, because of these financial embarrassments to the State of Georgia and to the counties depending upon this revenue, and because of the question of the authority of the Comptroller-General under the law to make assessments against delinquent taxpayers, it is respectfully submitted that the exigencies of the case require a speedy hearing that they may be determined and the dispute and litigation, which has been pending in divers shapes for five years, be brought to an end.

Respectfully submitted,

JNO. C. HART,
Attorney-General of Georgia.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 380

GEORGIA RAILROAD & BANKING COMPANY
vs.
WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF. } No. 384.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Due and legal service of the above and foregoing motion to advance the above stated cases now pending in the Supreme Court of the United States to be presented to the Court on November 19, 1906, is hereby acknowledged and copy of the same and all further notice or service is hereby waived, and in the event the motion is not presented to the Court on the said day named, we hereby consent that it may be assigned at such time thereafter as counsel for defendant in error may see proper.

This the — day of November, 1906.

ALEXANDER R. LAWTON,
MAYHEW CUNNINGHAM,
ALEX. C. KING,
Attorneys for Central of Ga. Ry. Co.

JOS. B. CUMMING,
JAS. R. LAMAR,
ALEX. C. KING,
Attorneys for Ga. R. R. and Banking Co.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

[redacted]

Office Supreme Court, U. S.
FILED.
OCT 16 1907
JAMES H. McKENNEY,

CENTRAL OF GEORGIA RAILWAY CO.

versus

WM. A. WRIGHT,
Comptroller-General of the State of Georgia,

and

JOHN W. NELMS,
Sheriff of Fulton County.

No. 85.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 380.

CENTRAL OF GEORGIA RAILWAY COMPANY
versus
WM. A. WRIGHT,
Comptroller-General of the State of Georgia,
and
JOHN W. NELMS;
Sheriff of Fulton County.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

BRIEF FOR PLAINTIFF IN ERROR.

THE PLEADINGS.

This is a writ of error from a judgment of the Supreme Court of Georgia, dated May 24, 1906, affirming a decree of the Superior Court of Fulton County, refusing an injunction and ordering to proceed back tax assessments on 15,000 shares of Western Railway of Alabama stock against the Central of Georgia Railway Company, for the years 1897 to 1905, both inclusive.

On the 10th of February, 1905, the Central of Georgia Railway Company filed its equitable petition (printed record, p. 22) in the Superior Court of Fulton County against the defendants to enjoin them from enforcing against the property of the plaintiff a certain tax execution, issued by the Comptroller-General on the 27th day of October, 1902, for

the sum of $8,160.00, for taxes alleged to be due to the State for the year 1900, with interest. The taxes were claimed of the plaintiff in respect of 15,000 shares of the capital stock of the Western Railway of Alabama.

A rule to show cause why interlocutory injunction should not be granted was issued February 10, 1905, and at the same time a temporary restraining order was granted (printed Record, p. 35).

The defendants answered March 23, 1905. (Printed Record, p. 38.)

On April 24, 1905, the plaintiff amended its petition (printed Record, p. 42); and the defendants duly answered the amendment. (Printed Record, p. 46.)

On June 14, 1905, after argument on the rule to show cause why the interlocutory injunction should not issue, the application was denied. (Printed Record, p. 38.)

The plaintiff then took the refusal to grant the interlocutory injunction to the October Term, 1905, of the Supreme Court of Georgia by what is known in our practice as "a fast writ of error." The Supreme Court affirmed the judgment of the court below and delivered the opinion in this case which appears in the printed Record at page 130; and is reported in 124 Georgia Report, 630. All others points presented by the Record, except the one point disposed of by this decision, were controlled by the decision in the case of Georgia Railroad and Banking Company against the same defendants, the two cases being argued together. This latter opinion is in the printed Record at page 133, and is reported in 124 Georgia Report, 596.

The case was then remitted to the Superior Court of Fulton County for final disposition in accordance with the decree of the Supreme Court of Georgia.

On January 29, 1906, the plaintiff amended its petition (printed Record, p. 52) and alleged that the Comptroller-General had issued, on January 23, 1906, tax executions against the plaintiff (which the sheriff was proceeding to levy) for the years 1895 to 1905, both inclusive, aggregating

an amount $89,757.00, besides interest at the rate of 7 per cent per annum from December 20th of each year on the amount claimed as taxes for that year.

The defendants duly answered this amendment (printed Record, p. 55).

The case was then tried, by consent, before the court without a jury (printed Record, p. 58); the defendants having withdrawn their demurrers (printed Record, p. 13).

On January 30, 1906, the court, after hearing argument, found generally in favor of the defendants and decreed that the several tax executions issued for the years 1897 to 1905, both inclusive, should proceed. (Printed Record, p. 58.)

On the 2nd of February, 1906, the plaintiff made a motion for a new trial (printed Record, p. 59), which on the same day was denied. (Printed Record, p. 63.)

On the 2nd of February, 1906, the plaintiff took its bill of exceptions to the Supreme Court of Georgia. (Printed Record, p. 13.)

On May 24, 1906, the Supreme Court affirmed the judgment of the court below, (printed Record, p. 12). This is the judgment which the plaintiff has brought to this court for review. The decision of the Supreme Court of Georgia, upon which the said final judgment was based, appears in the printed Record at page 11, and is reported in 125 Georgia Report, 617, and on all points raised by the Record, except the one point disposed of by this decision, the case is controlled by the decision in Georgia Railroad and Banking Company against the same defendants, which is reported in 125 Georgia Report, 589.

THE ISSUES.

The contentions may be briefly stated as follows:

1. That the plaintiff is not and never has been the owner of the fifteen thousand shares of stock in the Western Railway of Alabama, but that it has only an equitable interest in the stock. The Central Trust Company of New York holds the legal title to the stock as Trustee, to secure an issue of bonds. The stock is registered on the books of the Western Railway of Alabama, which is a corporation of the State of Alabama, in the name of the Central Trust Company of New York, and the certificate of the stock is in the actual custody and possession of the Trust Company, in the city of New York. The bonds which are secured by a deed of trust, were issued in 1887, by the Central Railroad and Banking Company of Georgia. The plaintiff was not incorporated until October 17, 1895, and bought the equitable interest of the Central Railroad and Banking Company of Georgia from Samuel Thomas and Thomas F. Ryan on June 9, 1896.

The Central Railroad and Banking Company of Georgia was in the hands of a receiver of the United States Court, and the receiver had pledged the equitable interest of the Central Railroad and Banking Company of Georgia, to secure a loan of six hundred thousand dollars, made to him by the Mercantile Trust Company of New York. Default having been made in the payment of this loan, the collateral was sold and by successive transfers passed into the hands of Thomas & Ryan, who sold to the plaintiff. These facts give rise to the following contentions:

(a.) That the taxation of said stock to the plaintiff is in attempt to tax it with property the situs of which is outside of the State of Georgia, contrary to the Fourteenth Amendment of the Constitution of the United States.

(b.) That the stock is taxed to plaintiff at its full market value, and on the theory that the plaintiff is the owner of the full legal title to the stock, whereas it owns only an

equitable interest in the stock, which is contrary to the Fourteenth Amendment of the Constitution of the United States.

(c.) That there is nothing in the laws or statutes of the State of Georgia which permits the State to tax a resident of the State with a mere equitable reversionary interest in property situated outside of the State, and even if there were, it would be contrary to the Fourteenth Amendment of the Constitution of the United States to tax plaintiff just as though it were the owner of the whole property, and not the owner of a mere equitable interest.

2. All the assessments are for back taxes on property omitted from returns for previous years. The laws of the State of Georgia authorizing the Comptroller-General to back tax property omitted from the returns of former years are contrary to the Fourteenth Amendment of the Constitution of the United States, in that they do not provide for any notice or hearing, and make the assessments of the Comptroller-General conclusive, the taxpayer being treated as a defaulter, and the door of opportunity being forever thereafter closed by his failure to return his property at the proper time.

3. That by the universal practice of the taxing department and common understanding for many years foreign stock had been treated as non-taxable, and that a new construction of the law and a new practice of the taxing department should not be given a retro-active effect but be prospective only, otherwise plaintiff is denied due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

4. That the plaintiff is denied the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States, in that the taxing authorities have applied the law so that no holder of foreign stock in the State of Georgia has ever been taxed with the same, saving the plaintiff and the Georgia Railroad and Banking Company of Georgia, the plaintiff owning one-half of the stock of the Western Railway of Alabama, and the Georgia Railroad and Banking Company the other half.

5. That the taxing authorities in the State of Georgia habitually, knowingly, and intentionally accept from taxpayers property at not more than two-thirds of its market value, whereas the plaintiff was taxed with this property at more than its full market value, contrary to the Fourteenth Amendment of the Constitution of the United States.

6. That the assessment made by the Comptroller-General was grossly excessive, contrary to the Fourteenth Amendment of the Constitution of the United States.

7. That it having been judicially declared by the Supreme Court of Georgia in the case of Wright vs. South Western Railroad, 64 Ga., 783, that the situs of shares of stock in foreign railroad companies, for purposes of taxation, is without the State of Georgia, it was not competent for the Legislature of Georgia to subsequently fix the situs of such shares of stock in this State, because that would be the taxation of property beyond the limits of the State of Georgia, contrary to the Fourteenth Amendment of the Constitution of the United States.

The issues are fully set forth in the assignment of errors, which appears hereafter.

STATEMENT OF FACTS.

The Amount Involved.

The executions for State taxes for the years 1897 to 1905 aggregate $80,865.00, besides interest from December 20th of the year for which the tax was claimed at the rate of 7 per cent per annum (printed Record, p. 79). Two years' taxes have accrued since 1905. This suit is for State taxes alone. If the stock is taxable it is liable for municipal and county taxes also, so that the liability which will be imposed upon plaintiff if it is cast in this litigation will exceed up to date $500,000.00.

The Assessments, and the Executions, and the Levy.

The assessments were all in the following form, the amount of the assessment varying for each year (printed Record, p. 79), to-wit:

"Whereas the Central of Georgia Railway Company, a corporation chartered under the laws of Georgia and doing business in this State, having failed and refused to return for taxation for the year 1896, 15,000 shares of stock of the Western Railway of Alabama, an Alabama corporation, said stock being then held and owned by said Central of Georgia Railway Company in this State; and having failed and refused to pay the taxes due the State thereon, for the year 1896, as required by law, I hereby assess the said 15,000 shares of stock of the Western Railway of Alabama, for said year, as being then of the value of $1,500,000.00. Said assessment being made by virtue of authority vested in me by law as Comptroller-General 'from the best information I can procure.' Given under my hand and seal of office, this January 23, 1906. Wm. A. Wright, Comptroller-General of Georgia."

It will be noted that the assessment which is at the foundation of the case asserts that "**said stock is held and owned by said Central of Georgia Railway Company in this State.**"

The proof shows that the stock is not held by the Central of Georgia Railway Company, and that it has never been

held by it, and that it is not owned by the plaintiff, and that it never has been owned by it. The proof also shows that the stock is not and never has been in the State of Georgia. The facts as to these matters are all supported by proof and there is not a scintilla of evidence to the contrary. The assessment fixes the value of the stock and assessed the whole value to the plaintiff.

The executions were in the following form, the figures being different for each year (printed Record, p. 78).

The execution issued by the Comptroller-General, dated October 27, 1902, for the State taxes for the year 1900, was for $8,160.00, together with interest. The following portion of the execution is the only material part thereof:

"Said amount being the State taxes due by the said Central of Georgia Railway Company upon the maket value of 15,000 shares of stock in the Western Railway of Alabama, of the aggregate par value of $1,500,000.00, owned and possessed by the said Railway Company on the day fixed for the valuation of property in the State of Georgia for taxation for the year 1900, which property was not returned for taxation for said year, as required by law, and the same has been assessed by me as Comptroller-General under the law from the best information he can procure."

The execution also asserts that the ownership of the stock is in the Central of Georgia Railway Company, and that it is liable for the whole value of the stock, whereas the fact is that the stock is encumbered with a heavy debt, placed on it by another party, and the interest of the plaintiff is subject to the debt, which is still a valid and subsisting debt.

The execution was levied on the freight offices and warehouses of the plaintiff in Atlanta, Georgia, by the defendant Nelms, sheriff of the county. (Admitted by paragraph 2, defendant's Answer, printed Record, p. 38.)

The execution could not be levied on the stock itself, because there is no process under the laws of Georgia whereby stock in a foreign corporation, the certificate of which is also outside of the State of Georgia, can be reached by the process of the State of Georgia. Therefore, neither the assessment of the Comptroller-General, nor the execution issued thereon, created any lien upon the stock. Therefore,

the assessment was equivalent to a judgment against the Central of Georgia Railway Company **in personam.** It was not a judgment **in rem.**

Relation of Plaintiff to Western Railway Stock.

About the year 1875, Central Railroad and Banking Company of Georgia (which is an entirely different corporation from the plaintiff), a corporation of the State of Georgia, acquired an undivided one-half interest in the ownership in fee simple of the railroad and franchises of the Western Railroad of Alabama, which consisted of about one hundred and forty miles of railroad, all of which was in the State of Alabama, with the exception of about a quarter of a mile, which was in the State of Georgia. The other one-half interest in the railroad was purchased by the Georgia Railroad and Banking Company, a corporation of the State of Georgia. About 1882 a corporation was formed, under the laws of the State of Alabama, with the name of the Western Railway of Alabama, having a capital stock of $3,000,000 par value. One half of this stock, to-wit: 15,000 shares, was issued to Central Railroad and Banking Company of Georgia and the other one-half to Georgia Railroad and Banking Company.

On or about the 2nd day of May, 1887, the said Central Railroad and Banking Company of Georgia executed and delivered to the Central Trust Company of New York, as Trustee, an issue of $5,000,000 of bonds, bearing the same date, and due on the first day of May, 1937, and transferred and conveyed to the said Trustee, among other stocks and bonds, the said 15,000 shares of the capital stock of Western Railway of Alabama. This conveyance was not a mere mortgage or pledge, which, under the law of the State of Georgia, contrary to the common law, does not convey title, but was a conveyance in pursuance of Civil Code Section 2771 and conveyed to the Trustee the **full legal title.** This point was determined in favor of the contention of the plaintiff by the Supreme Court of Georgia (124 Georgia, 630).

The certificate of stock was registered on the books of the Western Railway of Alabama in the name of Central Trust Company of New York, on August 8, 1887. (Printed Record, page 68). The certificate of stock was delivered to

the Trustee on that date and has been ever since in the custody and possession of the said Central Trust Company of New York, as Trustee, in the city of New York. (Printed Record, page 67.)

The dividends on the said 15,000 shares of stock have been paid by the Western Railway of Alabama direct to the Central Trust Company of New York, and, since the year 1896, the Central Trust Company of New York has deposited the dividends with the Guaranty Trust Company of New York to the credit of Central of Georgia Railway Company. (Printed Record, page 67.)

During the year 1892 all of the property and assets of every character of Central Railroad and Banking Company of Georgia passed into the hands of Receivers of the United States Court for the Southern District of Georgia, and, among the assets of said company, the equitable interest of said Central Railroad and Banking Company of Georgia in and to the said 15,000 shares of stock were administered upon by the Federal Court.

On the 10th day of January, 1893, H. M. Comer, Receiver of Central Railroad and Banking Company of Georgia, under the orders of the Court, pledged the equitable interest of Central Railroad and Banking Company of Georgia in this stock to secure a loan of $600,000 made to the Receiver by a syndicate represented by Messrs. H. B. Hollins & Company and the Mercantile Trust Company of New York, as Trustee. (Printed Record, page 68.) There being default in the payment of this last-mentioned indebtedness, the equitable interest of Central Railroad and Banking Company of Georgia was sold at public sale in pursuance of a stipulation, the terms of which are not material, but which appear in the printed Record, page 70, and this equitable interest in the stock was purchased at said sale by the Mercantile Trust Company of New York, who conveyed it to Messrs. Samuel Thomas and Thomas F. Ryan, who, on June 9, 1896, conveyed it to Central of Georgia Railway Company. (Printed Record, pp. 75 and 76.)

The Central of Georgia Railway Company is a corporation organized under the laws of the State of Georgia. It was incorporated October 17, 1895. It succeeded, by pur-

chase at judicial sale, to a number of the railroads formerly composing the system of Central Railroad and Banking Company of Georgia, though not to all of them; and is not subject to the debts and liabilities of the Central Railroad and Banking Company of Georgia.

The deed of trust conveying this stock to the Central Trust Company of New York has never been foreclosed. There has never been any default in the interest on the bonds and the bonds are now valid and subsisting obligations of Central Railroad and Banking Company of Georgia. Central of Georgia Railway Company has never agreed, either expressly or impliedly, to pay the bonds or to assume the indebtedness created thereby. The deed of trust has a stipulation to the effect (printed Record, page 65), that the voting power of this stock, and of the other stocks covered by the deed, shall be exercised by Central Railroad and Banking Company of Georgia, its successors or assigns, by means of proxies which shall be given to them by the Trustee whenever demanded, but this privilege is dependent upon the payment of the interest upon the bonds and the faithful performance of the covenants of the trust deed. There is also a provision in the trust deed (printed Record, page 65), that the dividends on this stock and the other stocks and bonds secured by the deed, shall be paid to Central Railroad and Banking Company of Georgia, or its assigns, unless and until default shall be made in the payment of the interest of the bonds secured thereby.

On page 37 of the Record appears a table showing the amount of interest paid by Central of Georgia Railway Company on the bonds secured by the deed of trust and also showing the amount of interest and dividends received by the Central of Georgia Railway Company from those collaterals conveyed under the trust deed, from which it appears that Central of Georgia Railway Company, since June 9, 1896 (which was the date at which it acquired its equitable interest in this stock), has paid out in interest on the bonds $2,196,000 and received in dividends on stocks and interest on bonds conveyed under the deed of trust, $1,032,566.92, which makes a deficit of $1,163,433. In other words, Central of Georgia Railway Company gets the interest on the stock of Western Railway of Alabama, not as the owner of the stock, but it receives it only by virtue of the fact that it

pays for it and keeps up the interest on the bonds secured by the trust deed.

If there should be a default under the deed of trust, and it should be foreclosed, and the collaterals securing the debt should not be sufficient to pay the indebtedness secured by the deed, the Central of Georgia Railway Company would not be liable for the deficiency judgment. It is not a party to the trust deed and has never in any way assumed the debt.

Correspondence between Comptroller-General, Attorney-General, and Plaintiff, Leading up to Tax Assessments.

May 25, 1901, the Comptroller-General wrote to the President of the plaintiff that he had just learned of the ownership by the plaintiff of the Western Railway of Alabama stock, that he noted its omission in plaintiff's return for that year, and then continued as follows:

"If I am correctly informed as to facts stated above, or the return of this property has not been made because of some misunderstanding of the requirements of the law of this State, I will be glad if you would make supplementary return of this property, in order that it may bear its proportion of the taxes assessed against it under the laws of this State." (Printed Record, p. 115.)

On the 10th of June, 1901, the Comptroller-General wrote that "unless taxes are paid upon this stock by your corporation, it is my duty, under the law, to assess same and issue execution for taxes due the State on said stocks. Please, if necessary, confer with your attorneys further about the matter and advise me." (Printed Record, p. 116.)

The correspondence between the parties is contained in the printed Record from page 115 to page 119, inclusive.

Knowledge of Comptroller-General as to Ownership of Stock.

"It was admitted by defendant's counsel that the State of Georgia was the owner of 166 shares of stock in the Georgia Railroad and Banking Company, which fact appears in the Comptroller-General's reports." (Printed Record, p. 81.)

A letter was read in evidence from Goodrich to Wright, Comptroller-General, dated May 4, 1889, concerning tax matters, and referring him to page 4 of the annual report of the Georgia Railroad and Banking Company for the year 1889. In said annual report, on page 4, under the head "Resources," appears the following: "15,000 shares Western Railway of Alabama stock at 60, $900,000.00." (Printed Record, p. 81 and p. 82.) This evidence was introduced for the purpose of showing that the Comptroller-General knew the facts as to the ownership of this stock, the Georgia Railroad owning one-half of the stock and the Central Railroad and Banking Company of Georgia then owning the other half, and the State of Georgia itself being a stockholder in the Georgia Railroad and Banking Company.

The Universal Understanding and Custom as to Non-Taxability of Stock.

In the year 1879 the Supreme Court of the State of Georgia decided the case of Wright, Comptroller-General, against Southwestern Railroad Company, 64 Georgia, 783, which held that stock in a railroad is really but so many shares of its property, and that property is real estate for the most part at least, and taxable by the State in which the railroad is located.

The Comptroller-General produced in court the annual tax returns of the Georgia Railroad and Banking Company, for the years 1878 and 1879. The return for the year 1878 showed, under the head of "stock or shares owned by," stocks in both domestic and foreign railroads, and concluded with this note: "Not liable for tax, the first two companies being railroad companies of this State, paying taxes for stockholders, the last being a foreign corporation." The return for the year 1879 shows, under the head of "stock or shares owned by," its interest in Western Railway of Alabama. The return of this year contained this note: "These stocks and interest in railroads are here set out that the Comptroller-General's office may have a complete property return. They are not returned for taxation, because they are not, under the laws of Georgia, taxable in the hands of owners or shareholders." (Printed Record, p. 82.)

The taxability of shares of stock was a new discovery of the Comptroller-General's. May 25, 1901, was the first time the question was ever mooted. This was the day he first called the attention of plaintiff to the matter. (Printed Record, p. 115.) On the same day it appears, from the affidavit of the Attorney-General (printed Record, p. 120) that he submitted the question to the Attorney-General whether said stock was subject to taxation, and after investigation the Attorney-General gave it as his opinion that such stock was subject to ad valorem taxation as other property in this State. It was thus a new question, upon which the Comptroller-General sought the advice of the Attorney-General of the State. This is the clearest indication that stock had never been taxed before in the State of Georgia. Otherwise, there would not have been any doubt, in the mind of the Comptroller-General or anybody else, as to such a familiar thing as stocks in corporations.

The plaintiff introduced in evidence the affidavits of tax receivers and tax collectors of forty-four different counties in the State, whose services as tax officers covered a long period of time. (Printed Record, p. 76, p. 77 and p. 78.) There were at this time 137 counties in the State of Georgia. These fourty-four counties contained the majority of the population of the State. The affidavits show conclusively that it was the habitual, universal practice not to tax either domestic or foreign stock, that nobody ever returned such property for taxes, and this was the well understood practice in the State of Georgia. This evidence was opposed by the affidavits of the tax receivers and tax collectors of Fulton and Richmond Counties (printed Record, p. 121). Not one of these affidavits mentions a single, solitary soul who ever returned a single share of stock for taxation. The affidavits are eloquent on this point by their silence.

The plaintiff read in evidence an extract from the official report of the Comptroller-General for the year 1903 (printed Record, p. 80), as follows:

"The Constitution of 1877 requires all property, real and personal, to be taxed ad valorem, except such property as is specifically exempted, and I have embraced the question in the tax list required by law to be submitted to all taxpayers, call for returns of all stocks and bonds, in which is included stock held by citizens of this State and non-resident

corporations. Notwithstanding this, I believe I am correct in saying that little, if any, of such stock in this State are returned for taxation, the owners claiming that there is no statute providing specifically for their taxation, and refusing to return them. I have a case now pending in the courts, involving this question, in which I am claiming back taxes upon property of this kind, amounting to about $200,000. I refer to the suit of the Comptroller-General against the Georgia Railroad and Banking Company to recover back taxes of 15,000 shares of stock of the Western Railroad of Alabama, held by the Georgia Railroad since 1881. The Central of Georgia Railway Company is also an owner of an equal amount of said stock, which we hope to subject to taxes for the same time."

The plaintiff also read in evidence an extract from the official report of the Comptroller-General for the year 1903, as follows: (Printed Record, p. 80.)

"Stock in foreign corporations of this State should be required to be returned for taxation in this State, it being claimed by the owners of such that there is no statute of Georgia which specifically requires their return for taxation. This item of property for tax would add several millions of dollars to the taxable property of the State."

Nobody Else in the State of Georgia has ever been Back-Taxed for Foreign Stock, Save This Plaintiff and the Georgia Railroad and Banking Company, Which Owns the Other Half of the Western Railway of Alabama Stock.

The amendment to the petition, which appears on page 42 of the printed Record, sets out this contention: the only reply which the defendants have made to this assertion is contained in the answer of the defendants (printed Record, p. 47), in which they say: "Answering said paragraph further, defendants say that even to this hour they know of no person or corporation, resident of this State, owning stock in any corporation, whose shares are taxable in this State, save only the petitioner and the Georgia Railroad and Banking Company." The defendant Wright further alleges in his answer, that he has given instructions to the tax collectors to collect taxes on this class of property, and asserts the Comptroller's willingness and desire to tax everybody else, and then the answer winds up with a challenge to the plaintiff to become an informant and point out persons who have

not returned their stock for taxation. It is significant that the defendants have not been able to discover even one person in the State of Georgia who paid taxes on stock, or who returned the same for taxes. The Record contains an important admission (printed Record, p. 80), as follows:

"It is admitted that the Georgia Railroad and Banking Company and the Central of Georgia Railway Company were the only persons owning foreign railroad stock, proceeded against for taxes on this kind of shares. The Comptroller's statement that he knew of no other delinquent was also admitted."

The Universal Custom in Georgia Is Not to Tax Property at More Than 66⅔ Per Cent of Its Value.

All railroad property is returned for taxation to the Comptroller-General, and in case of disagreement as to value, it is assessed by him, and if the property owner demands it the taxes are arbitrated. The evidence of A. W. Smith (printed Record, pages 108, 109, 110 and 111) shows that in fixing the value of railroads in Georgia it was the universal custom to find the market value and then deduct 33⅓ per cent of its value to equalize it with other property in the State. To the same effect is the evidence of T. A. Hammond (printed Record, pages 111 and 112). Both of these gentlemen had arbitrated tax returns for railroads in the State of Georgia and were familiar with the basis upon which such property was taxed. The Comptroller-General in his evidence (printed Record, p. 125) contends that he took off the 33⅓ per cent usually not in order to find two-thirds of the market value of the property, but to be certain that he was not assessing the property over its market value.

The plaintiff introduced in evidence two letters, written by Wright, Comptroller-General, to Forrest Adair, Vice-President of the Atlanta Water and Electric Power Company, dated respectively July 25, 1905, and August 14, 1905 (printed Record, p. 113 and p. 114); the material portion of these leters is as follows:

"It would appear that your gross income for three months is $26,000.00, operating expenses $11,000.00, leaving $15,000.00 net income for three months. This would give a net income for twelve months of $60,000.00, which capitalized

at 6 per cent would show the property to be worth in round figures $1,000,000.00. Allowing a reduction of one-third from this valuation, which it is claimed is the percentage at which other property in this State is taxed, would leave the value of the property taxable at $666,667.00."

This extract is from the first letter. The second letter contains substantially the same statement.

Forrest Adair, also sworn for the plaintiff (printed Record, p. 114) testified in regard to the arbitration of the taxable value of the property of his company as follows:

"I was present at the arbitration that was had in regard to the company's property. At that time Mr. Wright, Comptroller-General, appeared before the board of arbitrators and, in explaining how he arrived at the assessment that he had put on the company, he gave the same figures that are given in these two letters as to how he capitalized the net income and then stated further that he took off one-third, as stated in that letter, to bring it upon the annual basis upon which property is taxed in the State."

The Valuation of this Stock was Grossly Excessive when Compared with the Assessments of Similar Property.

The basis of valuation adopted by the Comptroller-General is shown by his evidence (printed Record, p. 120) as follows: "I ascertained the amount of gross earnings of the Western Railway of Alabama for each year in which the said shares of stock of the Western Railway were in default for taxes. I also ascertained the operating expenses of the said road for the same period and deducted the operating expenses from the gross income except when the operating expenses appeared to include betterments. I then deducted 66⅔ per cent of the income as operating expenses and from that sum deducted the annual interest charged on the said Western Railway of Alabama and capitalized the balance at 6 per cent, thus reaching what I deemed the market value of the shares of stock of the said Western Railway of Alabama, and made my assessment for each year upon this basis of value thus arrived at."

Notwithstanding the Comptroller's statement as to the method, his actual assessment in every year, except the year 1898, has been greater than the result arrived at by using his method. In 1899, it was 24.30 per cent more. For ten years, the average percentage which his actual assessment bears to his theoretical valuation is 109.98 per cent. Therefore, the Comptroller-General has added nearly 10 per cent to the gross over valuation which has resulted from his alleged method. See affidavit of George H. Richter. (Printed Record, p. 85.)

When the actual operating expenses were greater than 66⅔ per cent of the gross income the Comptroller nevertheless deducted 66⅔ per cent for operating expenses on the theory that when they were higher than 66⅔ per cent they included betterments which should not be charged against the gross income. A statement of the operating ratio of all the railroads in the United States, of all the railroads in Group 5, among which the Western Railway of Alabama is included, and of all the railroads in the State of Georgia, will be found in the printed Record, page 92. The averages of the operating ratio for eight years are as follows:

All railroads in the United States	70.62
Group 5	72.84
In Georgia	70.37

So that the Comptroller-General adopted an arbitrary operating expense which is lower than the average in the United States, in Group 5, or in the State of Georgia.

No railroad stock is assessed for taxes in the State of Georgia. So that the only way to arrive at a correct comparison is to take the assessment which the Comptroller-General made of the stock of the Western Railway of Alabama for each of the years, and add to it the funded indebtedness due by the Western Railway of Alabama. This will represent substantially what the Comptroller estimates to be the value of the Western Railway of Alabama. Thus

in the year 1897, the Comptroller-General assessed the stock of the Western Railway of Alabama

at	$2,800,000
adding to this the funded debt	1,543,000
the total is	$4,343,000

which is the value of the railroad property of the Western Railway of Alabama according to the assessment made by the Comptroller-General.

All railroad property in the State of Georgia is assessed by the Comptroller-General. Taking the different railroad properties in the State and assessing them for taxation on the theoretical basis which the Comptroller-General employed in the case of the Western Railway of Alabama stock and comparing the theoretical valuation thus obtained with the actual assessment imposed upon this property, allowing in no case operating expenses of more than 66⅔ per cent, we find this remarkable result: Taking the figures of all the railroad mileage in the State, the maximum percentage of actual assessment to the theoretical valuation was in 1903, when it was only 54.79 per cent, less than one-half of the maximum in the Western of Alabama case, 124.30 per cent in 1899. The average percentage of actual assessment to theoretical valuation of all the railroads in Georgia for ten years is 49.63 per cent. In other words the actual assessment of the railroads in Georgia is less than one-half what it would have been if he had employed the method which he did employ in the case of the Western Railway of Alabama. All of the assessments of railroad property are directly under the eye of the Comptroller-General, and as the law required him to assess from the best information at his command, and as this information was in his possession, and he was thoroughly familiar with it, he consciously used a method which taxed the holder of the stock of the Western Railway of Alabama at twice as much as railroad property in the State of Georgia is taxed. The result is a gross over valuation of the Western Railway of Alabama stock when compared with the only other kind of property with which it can possibly be compared in the State of Georgia.

Here follows a table of the percentage of actual assessment to values arrived at by capitalizing net income at 6 per cent for the years 1895 to 1904, comparing the Western of Alabama with the Atlanta and West Point and all other railroads in the State. This table is taken from the exhibit to the affidavit of George H. Richter: (Printed Record, pp. 87, 88, 89, 90, 91.)

Percentage of Assessment to Capitalized Value.

	1895	1896	1897	1898
W. of A.	113.11	123.33	122.93	87.02
A. & W. P.	59.69	49.63	46.6	43.72
All railroads	52.36	53.16	49.55	50.31

	1899	1900	1901	1902
W. of A.	124.31	101.87	108.44	112.53
A. & W. P.	43.16	39.9	37.09	40.37
All railroads	48.14	45.94	46.28	51.43

	1903	1904
W. of A.	108.51	97.76
A. & W. P.	38.44	35.38
All railroads	54.79	44.39

From the affidavit of John Bell (printed Record, p. 92), it appears that "for the whole ten years, using an average of the figures for each of the ten years, the assessments for taxation of all railroads in Georgia were 56.96 per cent of the theoretical value of all of the railroads in Georgia as ascertained by the Comptroller-General's method save only that the actual operating ratio was used instead of his theoretical ratio. This percentage of 56.96 per cent is to be compared with the percentage of 109.98 per cent which is the percentage that the assessment of the Western of Alabama bears to the theoretical value of that property ascertained by the same method." In other words, if the Comptroller's theoretical method had been employed, the railroads in Georgia would have been assessed at about twice their present assessment.

The estimate of the value of the Western of Alabama

stock made by the witnesses Bush, Goodyear, and the Comptroller-General for the years 1897 to 1904, follow:

Valuation of Stock.

	Bush.	Goodyear.	Comptroller General.
1897	1,350,000	1,200,000	2,800,000
1898	1,500,000	1,350,000	2,200,000
1899	2,100,000	750,000	2,900,000
1900	1,800,000	750,000	2,900,000
1901	2,100,000	1,800,000	3,200,000
1902	2,400,000	2,100,000	3,900,000
1903	2,700,000	2,400,000	4,400,000
1904	2,850,000	2,700,000	4,400,000

A comparison between the market value of the stocks of the Atlanta and West Point Railroad, Augusta and Savannah Railroad, Southwestern Railroad and Georgia Railroad and Banking Company during the same period is shown in tabulated form in the printed Record, pp. 107, 108.

Comparing the valuation per mile of the Atlanta and West Point Railroad which is assessed at a very much higher rate per mile than any other railroad in the State of Georgia with the assessment per mile of the Western Railway of Alabama on the basis used by the Comptroller-General, we get the following result: Using the year 1904 for the purpose of illustration, 30,000 shares of stock assessed by the Comptroller-General

at	$4,400,000
Bonded indebtedness	1,543,000
Total	$5,943,000

The Western Railway of Alabama is 137½ miles in length. Therefore, the Comptroller's valuation is 43,231 per mile. The valuation of the Atlanta and West Point Railroad for the same year was 22,182 per mile. The Comptroller-General's method produced a result almost twice as great as the actual assessment of the Atlanta and West Point Railroad, which is confessedly the highest taxed railroad in the

State of Georgia, and which is operated in connection with the Western Railway of Alabama as a part of the through line from Atlanta to Montgomery.

Assignment of Errors.

The Central of Georgia Railway Company, in connection with its petition in the above-stated cause for a writ of Error, makes the following assignment of errors which it avers occurred upon the trial of the cause and in the judgment of the Supreme Court of Georgia.

The plaintiff in error, Central of Georgia Railway Company, assigning error, says:

That in the record and proceedings in the aforesaid cause, and in the judgment of the Supreme Court of Georgia, there is manifest error in this:

First. That the Supreme Court of Georgia erred in affirming the judgment of the court below, to-wit, the Superior Court of Fulton County, Georgia, in which a judgment and decree was entered for the defendants against the pliantiff, because said judgment and decree denies the plaintiff the equal protection of the laws and takes its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

Second. That the Supreme Court of Georgia erred in affirming the judgment of the court below in refusing to grant a new trial to this plaintiff and overruling the motion of this plaintiff for a new trial, because said judgment denies to the plaintiff the equal protection of the laws and takes its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

Third. That the Supreme Court of Georgia erred in affirming the judgment and decree in this cause decreeing that the tax executions sought to be enjoined should proceed, the error being that each and every execution in favor of the State against the Central of Georgia Railway Company for the years 1897 and 1905 inclusive should have been perpetually enjoined by said decree as prayed by the Cen-

tral of Georgia Railway Company, because said executions issued without due process of law, and take plaintiff's property without due process of law and deny to it the equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States.

Fourth. Because the Supreme Court of Georgia erred in not adjudging that the said Superior Court of Fulton County should have decreed that the said executions were void because based on assessments which had been made without due process of law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Fifth. Because the Supreme Court of Georgia erred in affirming the said judgment and decree of the Court below, for that said decree was contrary to law because there was, on several dates of said assessments, no law or statute of force in the State of Georgia which afforded petitioner due process of law required by the Fourteenth Amendment to the Constitution of the United States in the assessment of back taxes on property omitted from prior returns, and that each of said assesments for taxes against the petitioner on Western Railway of Alabama stock are null and void because issued without due process of law in violation of the provisions of the Fourteenth Amendment of the Constittuion of the United States.

Sixth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because there is no law or statute of force in the State of Georgia which before or after the making of the said assessment or at the time of making the assessments afforded petitioner the right or opportunity to be heard as to its liability to said tax, or as to the valuation of the said stock, and that the assessments thus made by the Comptroller-General seek to deprive petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and the court erred in decreeing that such executions on said assessments should proceed.

Seventh. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because the law of the State of Georgia,

as contained in sections 812, 813, 814, 847, 855, 874, 879, 949 of volume 1 of the Code of Georgia of 1895, and the Acts of 1813, 1861, and 1804 in so far as they purport to authorize the assessment and valuation for taxation of property omitted from returns in prior years, is unconstitutional, null and void and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States in that the said sections of said Code and the Acts of the General Assembly of the State of Georgia fail to afford taxpayer an opportunity to be heard on the question of the value of property omitted from the tax returns of prior years.

Eighth. That the judgment of said Supreme Court in affirming said judgment and decree of said Superior Court was error because the assessment of back taxes on property omitted from the return of a prior year is an act judicial in its nature, and the taxpayer is entitled to due process of law in the assessment of such back taxes, with notice of the time and place of making such assessment, and the right and opportunity to be heard on the value of said property. Plaintiff alleges that the assessments involved in this case were each made without due process of law, and are void because made in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Ninth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because plaintiff alleges it appears from the record in said case that for the years 1897 to 1905, petitioner in good faith made its tax returns for each of said years; that the stock of the Western Railway of Alabama was not omitted from said returns or either of them with intent to conceal petitioner's interest in said property, or to escape taxation thereon, but that said stock was omitted in the honest belief and in reliance upon the universal practice of the taxing department of the State of Georgia that the same was not taxable; that said bona fide return was duly accepted by the Comptroller-General and for the said Comptroller without process of law and without the right or opportunity to petitioner to be heard and to offer evidence as to the value of said stock for each of said years, to issue assessments for each of the years from 1897 to 1905, and to back tax petitioner on said stock without the right to be heard on the question of the valuation thereof is to deprive

petitoner of its property without due process of law, contrary to the Fourteenth Amendment of the Constituiton of the United States, and the court erred in not enjoining said executions.

Tenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because there is no law of force which affords petitioner the right or opportunity to be heard on the assessment of back taxes on omitted property; that by the universal practice foreign stock was treated as non-taxable, and that a new construction of the law, and a new practice of the taxing department should not be given retroactive effect, but should be prospective only, and that the assessment of taxes on said foreign stock for the years when the same was not treated or regarded as taxable without affording petitioner the right and opportunity to be heard is unreasonable, arbitrary and unjust and, takes from petitioner its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Eleventh. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because on the evidence in said case to be found in the approved brief of evidence made a part of the record in this case and here referred to, plaintiff says that said assessments were issued without due process of law, without a hearing, and without the opportunity to petitioner to be heard on the question of value of said stock, and without notice of the time and place when said assessments would be made, and the assessments and each of them are void because issued without due process of law, because petitioner was not given a day in court or an opportunity to be heard as to the value of the Western Railway of Alabama stock, and that said void assessments are sought to be used to deprive petitioner of its property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and the court erred in not adjudging that the assessment should be cancelled and the executions issued thereon perpetually enjoined.

Twelfth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff in error insists that the pleadings and the admission of the defendants show that the holder of no foreign stock has been taxed in Georgia except petitioner and the Georgia Railroad and Banking Company, who together own the stock of the Western Railway of Alabama; that the taxation of plaintiff in error on foreign stock for years 1897 to 1905, and the failure to tax the holder of any other foreign stock for the same period is harmful discrimination against the petitioner in the administration of the law, and denies to petitioner the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Thirteenth. That the judgment of said Supreme Court affirming the said judgment and decree of said Superior Court was error because plaintiff in error insists that the record shows that all other property in the State is returned by the taxpayer at two-thirds of its market value, and that such returns on such two-thirds valuation is habitually, knowingly and intentionally accepted by the taxing officers and that where assessments are made by the Comptroller-General or State boards of arbitration he and they habitually, knowingly and intentionally assessed such property for taxation at approximately two-thirds of its market value, while the said Comptroller-General having assessed petitioner's stock at the full capitalization value, made no reduction to equalize such valuation and assessment with the other property in the State, and that in assessing petitioner's stock without making a reduction allowed on other property the Comptroller-General discriminated against petitioner to its injury and that such action on the part of the Comptroller and the assessment consequent thereon denied to the petitioner the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Fourteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because plaintiff insists that the record in said case shows the other property in the State of Georgia is not assessed beyond its market value, while the stock of petitioner in the Western Railway of Alabama was

assessed by the Comptroller and taxed by your petitioner at at least 75 per cent, above its market value, whereby petitioner was denied the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fifteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff insists it appears from the record that the other property in the State is habitually, knowingly and intentionally accepted and assessed by taxing officers of the State at least one-third below its fair market value, while the shares of petitioner in the Western Railway of Alabama were assessed and taxed by the Comptroller-General for each of the years at least 75 per cent above its market value, whereby petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Sixteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff insists that it appears from the record that the Comptroller-General in valuing and assessing railroad property for taxation adopted the method of capitalizing net earnings at 6 per cent and of deducting therefrom approximately one-third of the value thus found for the purpose of taxation, also, that while the Comptroller adopted the method of capitalizing the net earnings of the Western Railway of Alabama for each and all of the years at 6 per cent for the purpose of determining the value of the Western Railway of Alabama, and deducted the bonded indebtedness for the purpose of finding the value of the stock, yet after finding the value of the stock by such method the Comptroller-General made no deduction of one-third, or any other sum, from the valuation thus found; but assessed said stock for taxation at said valuation thus found without any deduction whatever; that in so doing, the Comptroller knowingly and intentionally discriminated against petitioner, and, in the administration of the laws denied the petitioner the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Seventeenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error, because plaintiff insists from the evidence in the case, that the Central of Georgia Railway Company is not the owner of the 15,000 shares of stock in the Western Railway of Alabama which are sought to be taxed against it by the assessments and executions sought to be enjoined by this petition, and the amendments thereto, but that the same is the property of the Central Trust Company of New York, and has been during all the years involved in this litigation. That the taxation of said property by the said State of Georgia for the said years is an attempt to tax property the situs of which is outside of the State of Georgia, and said taxation is, therefore, in violation of the Constitution of the United States and of the Fourteenth Amendment thereof, in that it attempts to deprive petitioner of its property without due process of law, and deny to it the equal protection of the laws.

Eighteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because plaintiff insists under the evidence in said case that the only interest which petitioner has in said shares of stock is an equitable, reversionary interest subject to the legal title and possession of the Central Trust Company of New York and the equitable interest of the bondholders who are the *cestuis que trustent* of said Central Trust Company of New York, and that the attempt to collect from this petitioner out of its property taxes upon the value of said shares of stock, as an entity, is an attempt to take the property of your petitioner, without due process of law, and is a denial to it of the equal protection of the laws, contrary to the Constitution of the United States and of the Fourteenth Amendment thereof.

Nineteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, that the assessments of the said shares for taxation against this petitioner is an effort on the part of the taxing officers of the State of Georgia to tax it on property in which it owns only an equitable revisionary interest, as above stated, and that there is nothing in the laws or Constitution of the State of Georgia, which provides for such taxation, and the attempt to assess it is an effort to

deprive petitioner of its property without due process of law and deny to it the equal protection of the laws, contrary to the Constitution of the United States and of the Fourteenth Amendment thereof.

Twentieth. That the judgment of the said Supreme Court affirming said judgment and decree of said Superior Court was error in this, that the said Supreme Court of Georgia having decided that the decision of said Supreme Court rendered in the case of Wright, Comptroller-General vs. The Southwestern Railroad, reported in 64 Georgia, pages 783, 799, was the law of this State and was not altered by the adoption of the Constitution of 1877 and was binding upon said Supreme Court as the unanimous decision of the said court until reversed by a full bench, and said decision fixing the situs of shares of stock in foreign railroad companies for purposes of taxation as without the State of Georgia upon the ground that the same were but representatives of the physical properties of said foreign corporations located outside of said State, it was not competent for the Legislature of Georgia by a legislative enactment to undertake to fix the situs of the said shares of stock or to tax the same, and such attempt at taxation was a taxation of property beyond the limits of the State of Georgia and was contrary to the Constitution of the United States and to the Fourteenth Amendment thereof, and was the taking of property without due process of law.

BRIEF AND ARGUMENT.

I.

Taxation by the State of Georgia of a Resident of the State With Property Situated Beyond the Territorial Jurisdiction of the State is Contrary to the Fourteenth Amendment of the Constitution of the United States.

In Louisville, Etc. Ferry Co. vs. Kentucky, 188 U. S., 385, it was decided that the taxation by the State of Kentucky, to a corporation created by that State, of a ferry franchise granted to it by the State of Indiana, was prohibited by the Fourteenth Amendment of the Constitution of the United States. The court said, at page 396:

> "While the mode, form and extent of taxes are, speaking generally, limited only by the wisdom of the Legislature, that power is limited by a principle inherent in the very nature of constitutional government, namely, that the taxes imposed must have relation to a subject within the jurisdiction of the taxing government."

and again at page 397:

> "We recognize the difficulty which sometimes exists in particular cases, in determining the situs of personal property for purposes of taxation, and the above cases have been referred to because they have gone to judgment, and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction, or over which it can exercise dominion."

In Delaware L. & W. Rd. vs. Pennsylvania, 198 U. S., 341, it was held that the taxation by the State of Pennsylvania to a corporation of the State of Pennsylvania of a quantity of coal which was physically situated in another state, was a taking of its property without due process of law.

In Union Refrigerator Transit Company vs. Kentucky, 199 U. S., 194, it was decided:

"The power of taxation is exercised upon the assumption of an equivalent rendered in the protection of the property and person of the taxpayer, and if such equivalent cannot possibly be rendered because the property taxed is wholly beyond the jurisdiction of the taxing power, the taxation thereof within the domicil of the owner amounts to a taking of property without due process of law.

"While there may be individual cases where the weight of the tax necessarily falls unequally on account of special circumstances the general rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of the power in this respect may justify judicial interference.

"The proper use of a legal fiction is to prevent injustice and the maxim mobilia sequuntur personam may only be resorted to when convenience and justice so require. That doctrine does not apply to tangible personal property permanently located in another State where it is employed and protected, acquires a situs and is subject to be there taxed irrespective of the domicil of the owner; and an attempt on the part of the State in which the owner is domiciled to tax such property amounts to a deprivation of property without due process of law within the purview of the Fourteenth Amendment.

"So held in regard to the taxation of cars owned by a transit refrigerating company, and which were permanently employed without the State in which the company was domiciled."

II.

The Situs of This Stock for Purposes of Taxation is in New York at the Residence of the Central Trust Company, Trustee, Which Holds the Legal Title to the Stock.

The fact is established that the Central Trust Company holds the legal title to the stock. It has been so expressly decided by the Supreme Court of Georgia in this case, in the following passage:

"We agree with counsel for the railroad company that the deed of trust comes squarely within the terms of the Civil Code Section 2771, and that it conveyed to the Trustee full legal title to the stock during the life of the bonds which it was given to secure, subject to be defeated by payment of the principal of the bonds at maturity, together with the interest as it accrued."

C. of Ga. Ry. Co. vs. Wright, 124 Ga., 630-631.

Code Section 2771 is as follows:

"Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage."

The State contended that the instrument was a mere mortgage which in Georgia passes no title, but is merely security for the debt. Code Section 2723. "A mortgage in this State is only security for debt, and passes no title."

This contention of the State was overruled by the court, and the fact is firmly fixed that the legal title to this stock is in the Central Trust Company of New York, Trustee, under the deed.

The general rule of law is that the situs of personal intangible property is at the residence of the person who holds the legal title.

"Generally personal property in the hands of a trustee is to be assessed at the place of his domicile."

Cooley on Taxation (3 Ed.), page 660.

"In the absence of statutory provisions to the contrary, choses in action follow the person of the creditor, and where the legal title is in a trustee, he is regarded as the owner, and they are subject to be taxed at his domicile."

Trustees vs. City Council, 98 Ga., 648.

"Taxes upon property held in trust by the trustees of the Greene Foundation are properly assessed in Boston to the corporation in its corporate name, and should not be assessed to the assistant minister for the time being of Trinity Church, although he is entitled to the whole net annual income of said property."

Trustees of Green Foundation vs. City of Boston, 12 Cush. 54.

"The legal estate in trust property being in the trustee, personal property subject to the trust must be assessed by the trustee's domicile, that being the domicile of the legal owner."

56 American Decisions, 535.

"The trustee for a sinking fund of the Western Railroad corporation, a non-resident corporation, the fund being held and managed by the trustees for the sole purpose of paying an indebtedness of the corporation, were held liable for the taxes."

People vs. Assessors of Albany, 40 N. Y., 154.

"A credit held in trust by a resident of this State is to be listed for taxation by said resident as trustee, in the tax district in which he resides. The general rule is well settled that in the absence of a statute to the contrary, the law looks upon a trustee as the owner of personal property, and the place of assessment for taxation at his domicile."

State vs. Clarke, 79 N. W., 829, and the cases cited at page 830.

See also,

Mackey vs. City and County of San Francisco, 61 Pac. Rep., 382.

III.

The Central of Georgia Railway Company is not a Beneficiary Under the Trust Deed, Nor Beneficially Interested Thereunder and Therefore the Cases Which Hold That Either the Trustee or the Beneficiary of the Trust Deed May Be Taxed With Property Held in Trust, Are Not in Point.

The Central of Georgia Railway Company is not beneficially interested under the Deed of Trust. The holders of the bonds secured by the deed are the beneficiaries of the trust deed. The interest of the Central of Georgia Railway Company is adverse to the trust deed. It is a mere equitable interest in the property covered by the deed.

The cases which hold that either the trustee or the beneficiary of the trust deed may be taxed with the property covered by the trust deed are usually cases where the trustee and the beneficiary of the trust deed reside in different localities of the **same State.**

Hathaway vs. Fish, 13 Allen, 267.

City of Lexington vs. Fishback's Trustee, 60 S. W., 727.

In the two cases cited above which are typical, the situs of the property for purposes of taxation was very properly held to be a matter of statutory regulation of the State. Both the trustee and the beneficiary of the trust being residents of different localities in the same state, it was, of course, competent for the State to regulate by statute in which locality and to which party the trust property should be taxed.

But in the case at bar the Central of Georgia Railway Company not being a beneficiary of the trust deed, but holding its equitable interest from an entirely independent and adverse source, the cases cited are not in point.

There is a case which holds that where the trustee and the beneficiary reside in different states that the personal

property of the trust estate may be taxed to the beneficiary, and also a case from the same jurisdiction that it may be taxed to the trustee. But even if these cases are correctly decided, they would not control the case at bar, because the Central of Georgia Railway Company is not in any sense a beneficiary of the trust deed.

In the case of Davis vs. Macy, 124 Mass., 193, it is decided that where part of the beneficiaries under the trust are residents and part are non-residents, that the resident beneficiaries are taxed, and the trustee who was resident in the State was to be taxed with the interest of the non-resident beneficiaries.

The Supreme Court of Massachusetts had decided in Dover vs. City of Boston, 6 Gray, 131, that an inhabitant of the State was not taxable with shares of stock held in trust by trustees residing in another state.

In the subsequent case of Hunt vs. Perry (Mass.), 43 N. E., 103, it was decided that under precisely the same circumstances the beneficiary was taxable and not the trustee. The difference in the result of the two cases arose from a change in the statutes of the State, to which the Court called attention in the latter case.

In view of the late decisions by the Supreme Court of the United States, this case of Hunt vs. Perry was not correctly decided if the personal property taxed was situated in another state. The Court, at page 104, says:

> "It has long been the policy of the Legislature to tax a resident owner in the place where he lives for his personal property, **wherever it may be situated, and whether within or without the State.**"

And again on the same page the Court says:

> "The defendants contend that the statute, if such is its true construction, is unconstitutional. This argument rests on the ground that the property is situated out of the State; that the beneficial interest of a cestui que trust is nowhere else made taxable; and that this statute selects for taxation a kind of interest not otherwise taxable, and so imposes a tax which is disproportionate. This argument, however, is met by the sug-

gestions already made that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take aawy the power of the Legislature to subject the interests of the cestuis que trustent to taxation here, if they live here. There is no more reason for holding this to be beyond the power of the Legislature than there would be for holding the taxation of cattle and sheep, of manufactured goods, or of shares in corporations, untaxable here, because situated out of the State."

The reasons here given are in the very teeth of the late decisions of the Supreme Court of the United States on the subject of the taxation by one state of property situated in another state, which are referred to elsewhere in this brief.

Even if the case of Hunt vs. Perry is correctly decided, it does not cover the case at bar, because the State has not confined itself to taxing **merely the interest of the plaintiff in the stock, but has taxed plaintiff with the whole value of the stock.**

IV.

The situs of this Stock is Not in the State of Georgia for Purposes of Taxation.

The Western Railway of Alabama is a corporation of the State of Alabama. All of its property is situated there, with the exception of about two miles of railroad, which lies in the State of Georgia. This stock is registered on the books of the corporation in the name of the Central Trust Company of New York, and has been in the physical possession in the city of New York of the Central Trust Company of New York since 1887. The Central of Georgia Railway Company is not the owner of the stock. It simply owns an equitable interest in the stock. It is not the obligor on the bonds which are secured by the deed to the Central Trust Company of New York. The deed to the Central Trust Company of New York has never been foreclosed. There has never been any

default upon the indebtedness which the deed secures. The bonds are an outstanding, valid and subsisting obligation of the Central Railroad and Banking Company of Georgia. If there should be a default in the payment of the interest on the bonds, or of any of the covenants of the deed which secures the bonds, and if the deed should be foreclosed, and the property conveyed under the deed should not be sufficient to pay the debt, and there should be a deficiency judgment, the Central of Georgia Railway Company would not be liable. The Central of Georgia Railway Company obtains the right to the dividends on the stock and the right to vote it by paying interest on the bonds secured by the deed. It is under no obligation of any kind to pay the interest on the bonds. It does so because it thinks it is to its advantage to do so. Since the Central of Georgia Railway Company has owned an equitable interest in this stock, it has paid out in interest on the bonds secured by the deed the sum of $2,196,000.00, and has received by way of dividends and interest on the stocks and bonds conveyed by the deed the sum of $1,032,566.92. The difference between the amount paid and the amount received being $1,163,433.00 (See exhibit in Record, page 37.)

The Supreme Court of the State of Georgia has proceeded upon the theory that the situs of stock for the purposes of taxation was entirely a matter of statutory regulation; that if the statutes of the State of Georgia provided that, under circumstances such as exist in this case, that stock had its taxable situs in Georgia, that the statute was conclusive on the subject. The Supreme Court finds the facts in the case substantially as we have stated them above (124 Ga., 630); and rests the taxability of this stock to the Central of Georgia Railway Company on Political Code Section 778, which is as follows:

> "Taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life-tenants, and those who own and enjoy the property, are chargeable with the tax thereon. Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax."

This section of the Code is not of statutory origin. It is a codification of the cases decided by the Supreme Court of Georgia, which are annotated on the margin of the Code section. Every single one of the cases annotated on the margin of the Code section, and every one of the cases referred to by the Supreme Court, in its decision, are cases which involve the taxation of land in the State of Georgia. Where the land lies in the State of Georgia it is competent for the State by statute to regulate the matter of the person to whom the taxes should be charged, because at last the tax falls upon the property itself, and the equities of the parties who are interested in the property can be adjusted between themselves. But in the case at bar the property is not within the State of Georgia, and the State of Georgia has no power to bring it within the State for the purposes of taxation. If the property which is the subject matter of the tax is outside of the State, the State of Georgia cannot tax it.

Under the admitted facts the Central of Georgia Railway Company does not fall within the language of the Code section. It is not the owner of the property. All it owns is the right to the property by paying the debt created by the Central Railroad and Banking Company of Georgia in 1887, which is a charge against the property. This is very far short of ownership. It does not stand in the attitude of a life-tenant who enjoys the property. It is neither the maker nor the holder of a bond for titles. The Supreme Court of Georgia seems to have gone off on the idea that because the Central of Georgia Railway Company voted the stock and received the dividends on the stock that, therefore, it was taxable with the stock just as though it was the owner of the stock, but as we have shown above, it only receives the dividends and the right to vote by paying the interest on the bonds secured by the deed as the interest is due and matures, and this transaction up to date has been a very unprofitable one to the Central of Georgia Railway Company. The Supreme Court of Georgia says:

> "We find that in Georgia the law looks in matters of taxation rather to the substantial beneficial ownership of property conveyed under the Civil Code Section 2771 than to the shadowy, technical ownership of the legal titles."

This is all right, provided the property lies in the State of Georgia, but when the property which is the subject matter of the tax is not in the State of Georgia, it is not within the constitutional power of the State of Georgia to tax it.

The general rule is that the situs of intangible personal property such as shares of stock in a corporation is at the residence of the holder of the legal title, which in this case is admittedly the Central Trust Company of New York, whose residence is in the State of New York. This proposition we have fortified with the authorities in another portion of this brief. If this is true, then it is competent for the State of New York to tax this stock.

It has also been held that

> "Shares of corporate stock may be given by the State which creates or licenses the corporation a situs within the State for the purposes of taxation, so as to render them taxable though their owner is a non-resident."
>
> 1 Cooley on Taxation (3 Ed.), p. 92, and cases cited.
>
> 2 Cook on Corporations (5 Ed.), Sec. 566 and cases cited.

According to this theory, it would be competent for the State of Alabama to tax these shares of stock.

According to the theory of the Supreme Court of Georgia, these shares are also taxable in the State of Georgia. So that we have a situation where identically the same property is at the same time taxable in three different jurisidictions. If each one of the three states has the right to tax these shares of stock, then the owner of the stock is defenseless, unless he is protected by the Constitution of the United States.

It would certainly be depriving a person of due process of law if precisely the same thing were taxed at the same time in three different jurisdictions. The maxim "mobilia sequuntur personam" is a fiction of law, which has no force

or effect when the convenience, necessity and reason which support it no longer exist. Intangible personal property, from its very nature, requires some fiction of the law to give it locality, and hence for purposes of taxation the maxim "mobilia sequuntur personam" applies.

> "The maxim 'mobilia sequuntur personam' is not of universal application. It does not rest on any constitutional foundation, but gives way before express law."
>
> 1 Cooley on Taxation (3 Ed.), p. 87.

If we follow the maxim of the law, this stock is clearly taxable to the Central Trust Company, in the State of New York, but the State of Georgia in substance, says: "Away with the maxim. It prevents us from taxing this property in the State of Georgia. We find a person here who owns a qualified interest in the property. It is true the person does not own the property, but having a slight, unprofitable and only a qualified interest in the property, this is enough to give us jurisdiction to tax the person with the whole property, just as though it were the owner in truth and in fact of the whole property."

We maintain that the State of Georgia cannot constitutionally draw to itself the power to tax property which is beyond its jurisdiction. It has no more right to tax the person resident in the State of Georgia with this stock than it would have the right to tax it with a piece of land situated in the State of New York, in which it owned a qualified or equitable interest.

In the Indiana Ferry Case (188 U. S., 385), which is cited above, the property there involved was intangible property. It was held by the Court to be an incorporeal hereditament, and that its situs was in the State of Indiana, and, therefore, the State of Kentucky had no constitutional power to tax it in Kentucky.

In the Coal Case (198 U. S., 341), which is cited above, where the State of Pennsylvania attempted to include in the valuation of the capital stock of a corporation of the State of Pennsylvania a quantity of coal which was situated in New York, it was held:

> "Where the proceeds of the sale might go when the coal was sold, whether into the treasury of the company at its offices in New York City, or indirectly to the State of its incorporation, is not important."

So here it is not important that the Central of Georgia collects the dividend on the stock, because it does not do this by virtue of any ownership of the stock, but because it pays for the right by paying interest on the bonds which the deed secures.

This Court, in the case of Buck vs. Beach, decided May 27, 1907, reported in No. 15, Advance Sheets of Opinions of the United States Supreme Court, page 712, denied the right of the State of Indiana to tax certain notes which were owned by a resident of the State of New York, and which were secured by property situated in Ohio, the notes themselves being in the possession of an agent of the owner in the State of Indiana. The State of Indiana rejected the fiction of law in regard to the situs of intangible property, and assumed the right to tax such property where the evidence of it was physically situated. This Court held that it was a denial of due process of law to do so. In other words, the situs of intangible personal property is regulated by general principles of law, which the State cannot overlook or ignore in the matter of taxation and, merely because it is convenient to do so, arbitrarily decree that intangible personal property is situated in the State when, according to the well established principles of law, it is situated in another state. If it were otherwise the subject of the taxation of intangible property would be hopelessly confused.

There is no dispute as to the facts of the relation which the Central of Georgia Railway Company bears to this stock. The facts as we have stated them are all conceded by the State. The Supreme Court of Georgia has decided that under the undisputed facts this stock is taxable in Georgia. We maintain that it is not taxable in Georgia, because the property under the facts is not in Georgia. The property of the corporation is in Alabama, the stock certificates are physically in New York, the holder of the legal title is in New York and merely because there happens to be in Georgia, a person who is not now the owner of the stock, who has never been the owner and who may never be the owner, but who has an interest which is equitable in its nature, which is subject to an indebtedness created by another per-

son, an interest which is neither technically nor substantially ownership, the State of Georgia assumes the right to tax the stock on the theory that its situs is in Georgia.

V.

The Plaintiff Cannot be Taxed With More Property Than it Owns. It Has Been in This Case and This is a Denial of Due Process of Law.

If we concede that the interest of the plaintiff in this stock is taxable that will not content the defendants. They say that you must pay taxes on the whole stock because you own only a qualified interest in it. It would be just as reasonable to say that a man residing in Georgia who owned a half interest in a house in the State of New York must pay to the State of Georgia taxes on the full value of the house. The plaintiff does not own the whole stock. Its ownership, or whatever you may call it, is very far short of the stock itself. The assessment is levied on the theory that the plaintiff is the owner of the full legal title of the stock. The defendants have never for a moment considered taxing the plaintiff merely with its interest in the stock. They are after the full value of the stock. We say this is not due process of law. It is fundamentally wrong. It shocks the sense of justice.

VI.

This is Not a Case Where a Taxpayer Who Owns Stock Has Pledged it to Escape Taxes on It.

The plaintiff did not pledge the stock, had nothing whatever to do with it, and did not receive the proceeds of the loan. It was pledged by another party in 1887. The plaintiff was not born until 1895. It purchased subject to the debt. The debt still rests on the stock. Before plaintiff

can get title to the stock it must pay off the debt. It is under no obligation to pay the debt. If a resident owner of foreign stock should resort to the shift or device of pledging it to a foreign person to avoid taxation, such a device would be ineffectual and invalid and would not relieve the resident owner from taxation. But that is not this case.

1 Cooley on Taxation, p. 767.

There may be reasons of public policy against permitting an owner of stock to escape taxation by a mere pledge of it to another, for that would afford an easy opportunity to escape taxation; but no such reason can be invoked here, because the pledge was in existence before this corporation was born. The two cases cited below were cases where the owners of the stock pledged the stock themselves as collateral security for loans to **them.**

Stanford vs. San Francisco, 131 Cal., 34 (33 Pac. Rep., 145).

Ratterman vs. Ingalls, 480 St., 468 (28 N. E., 168).

The defendant is inconsistent. In the Georgia Railroad case the Comptroller-General contended in his answer (printed Record, p. 82). "When shares of stock subject to be taxed by the Constitution and laws of Georgia are found issued in the name of or in the possession of a resident holder and owner thereof, it is no concern of the taxing officer to inquire who may, under some private contract, be entitled to the dividends which the holder and owner receives. These private equities between parties are no concern of the State or its taxing officers. The entire value of the share or shares is taxable as a single entity at the domicile of the legal owner in whose name and possession said shares are found, and is not taxable in parts to the various persons who may be entitled to receive or share in the dividends arising therefrom."

And yet in this case the only excuse for taxing Central of Georgia Railway is because it **ultimately** receives the dividends. It does not get them like the owner does as the **usufruct of his property,** but receives them only after it pays the interest on the bonds secured by the trust deed. It buys the dividends. The Western Railroad pays the dividends to

the Central Trust Company of New York (printed Record, p. 67), and the Central Trust Company turns them over to the Central because it pays the interest on the bonds.

VII.

The Statutes of the State of Georgia as Construed by the Supreme Court of Georgia in the Matter of Back Tax Assessments do not Provide for Either Notice or Hearing and Therefore do not Provide Due Process of Law Contrary to the Fourteenth Amendment of the Constitution of the United States.

During the 130 years that Georgia has been a State no citizen has ever paid tax on foreign stock. Only two citizens have ever "been proceeded against for taxes on this class of property." They were singled out, not merely for the current year 1905, but were back taxed for the years 1881 to 1904, inclusive. This was done under the following section of the Code:

Sec. 813. **When no Return, Comptroller to Assess.** In cases of failure to make return, the Comproller-General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies or institutions.

Plaintiff's Good Faith Eliminated.

This section does not provide for notice, or fix any time and place for hearing in the assessment of these back-taxes for former years. The assessments in the case were made without pleadings or process, although returns had been made and accepted and the Comptroller General knew that foreign stock had never been returned by any citizen of the State during the years 1895 to 1902.

In answer to the plaintiff's contention that it had acted in good faith, and omitted the stock in reliance on universal understanding that foreign stock was not taxable, the Supreme Court of Georgia held:

"All considerations of the good faith of the railroad company should be eliminated from the discussion. It may be conceded that the officials of the company honestly believed that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia Railroad's ownership of it, or to deceive the Comptroller General in any way. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary, furnishes no excuse for non-payment."

Plaintiff Held to be Entitled to no Notice or Hearing as a Penalty.

"When the taxpayer fails to return in whole, or in part; fraudulently, or through honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have mutual rights between himself and the taxing power adjusted by arbitration is concerned. In other words, ample 'machinery' is available, to the citizens who make full returns; deprivation of the right to be further heard, **is one of the penalties visited upon the defaulter.** The Georgia scheme of taxation requires the citizen to know what property owned by him is subject to taxation, and contemplates that he will disclose it fully to the taxing officer.

"Every opportunity in the way of notice, protest, hearing, and arbitration is afforded him to correct any mistake of that officer and to obtain exact and even justice. To the defaulter no 'machinery' is furnished for the correction of his own error; he is entitled to no notice, hearing or arbitration; but the officer is required, from the best information obtainable, to ascertain the value of the property, and assess it accordingly. This scheme of taxation is not unconstitutional."

Assessment Conclusive Even Though Excessive.

"As to those years in which the Plaintiff had an opportunity to return its property for taxation and failed to do

so, and for which the property has been assessed by the Comptroller-General, whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case, it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither averment nor proof that the assessment was the result of fraud or corruption on the part of the Comptroller-General. If there had been, a different question would have been presented."

This construction of the Georgia statute to the effect that plaintiff was entitled to no notice or hearing and that a back-tax assessment issued without a hearing was conclusive, raises one of the fundamental issues presented in this case.

The Back-Tax Assessments Issued Without Due Process of Law.

The question of due process of law was dealt with by the Supreme Court of Georgia only in the first decision. That opinion greatly simplifies the issue, because there is now no question as to the character of the notice required or the notice given, since the court holds not only that the statutes do not provide for notice, but that the closing of the "door of opportunity" was intentional and **the deprivation of the right to be heard was a penalty.**

Plaintiff contends that when the Fourteenth Amendment provided that no person shall be deprived of his property without a hearing, it also declared that he should not be deprived of a hearing as a penalty. The statute cannot reason in a circle, and provide that "every one except a defaulter shall be entitled to a hearing. Plaintiff is a defaulter and therefore not entitled to a hearing." If the penalty for being a defaulter is, that the defaulter, though acting in good faith, shall be deprived of the right to be heard, there must be a preliminary proceeding—something in the nature of "office found,"—some hearing, to establish a default or delinquency, fraught with such perilous consequence for **"liability and right are inseparable."** (Hovey vs. Elliott, 167 U. S., 414, 409.) Whatever the crime, however great the contempt, howsoever contumacious a party, he cannot be deprived of the right to be heard when his property is

to be taken. Judgment of any sort must be after notice, and if the criminal wrong-doer cannot be punished without a hearing, by so much the greater reason an honest and mistaken citizen cannot be declared a defaulter, and deprived of the right to be heard as a penalty. It is contrary to the first principles of the social compact to deprive one of the right to be heard. Hovey vs. Elliott, 167, U. S., 414 passim.

"A party, by his misconduct, cannot forfeit a right so that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form."

Cooley Con. Lim. Fed., 518.

To deprive one of property without an opportunity to be heard, would be regarded as "a sentence—an act of spoliation."

Chicago, etc. R. R. vs. Chicago, 166 U. S., 235.

In Galpin vs. Page, 18 Wallace, 350, the Court said:

"It is a rule as old as the law, and never to be more respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

Galpin vs. Paige, 18 Wall, 368 (bot.)

The Fourteenth Amendment recognizes "the principle of natural equity which recommends itself to everyone."

Chicago, etc. R. R. vs. Chicago, 166 U. S., 238.

And "where the proceedings are arbitrary, oppressive, or unjust, they are declared not to be 'due process of law.'"

Glidden vs. Harrington, 189 U. S., 258.

VIII.

The Right to be Heard Extends to the Assessment of Taxes.

Under the Fourteenth Amendment, the Legislature is bound to provide a method for the assessment and collec-

tion of taxes that shall be "in conformity with natural justice."

Turpin vs. Lemon, 187 U. S., 51.

"Nothing is more clearly established by weight of authority, absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceedings."

Justice Fields in R. R. Tax Case, 13 Fed. Rep. 752; see also page 750.

1 Cooley on Taxation (3 Ed.) 626.

In the levy of specific taxes of so much on so much, and the issuance of licenses, or imposition of poll taxes, there is nothing which could be done if a hearing was granted, hence no notice is required in that special class of cases.

"But when a tax is levied on property not specific, but according to values to be ascertained by assessors, upon such evidence as they may entertain, a different principle comes in. They then act judicially. In such cases a notice and an opportunity to be heard, at some stage of the proceedings, must be granted before the particular judgment becomes final."

Hager vs. Reclamation Dist. 111 U. S. 709-710.

A notice is specially necessary where the assessment is equivalent to a judgment in personam and binds not merely the particular property assessed for taxation, but all the estate of the taxpayer. In Georgia, tax fi fas bind all the property of the defendant, and on them even a garnishment may issue. Pol. Code, 880-883.

The defendant conceded that notice was necessary in tax proceedings, but contended that the original notice requiring the defendant, during the then current year, to return what he owned on April 1 of such current year, was notice which authorized the back-tax assessment in 1905.

Plaintiff denied that the statutory process issued in 1895 was like perpetual motion or like gravity,—a continuing force.

The authorities all sustain the proposition that the

Statute must provide an opportunity to be heard on the charge, whether that charge be an assessment for the current year or a re-assessment for previous years. As long as the State can change the assessment, the citizen has a right to be heard on the question as to whether the change shall be made, and as to the amount of the new assessment.

For the Statute must "provide a mode of contesting the charge."

Davidson vs. N. O., 96 U. S., 105 (top).

"At a time and place fixed for public sessions of the officers, when the party interested has a right to be present and to be heard and judicially contest the validity of the proceedings."

Glidden vs. Harrington, 189 U. S., 259.

If the charge is for taxes for the current year, there must be notice. If the charge is for back taxes, there must also be notice, and a right to be heard on the back-tax charge.

"Whenever a re-assessment of any kind is made, notice of that re-assessment is essential."

Bellingham Co. vs. New Whatcon, 172 U. S., 318 (top).

IX.

Right to be Heard Applies to Changes in Assessments by Adding Omitted Property.

The rule is the same whether the re-assessment is by a change in the valuation, or by the addition of the property omitted.

"Tax statutes are unconstitutional so far as they authorize an assessor to add property to the list of the taxpayer without giving him notice."

Kuntz vs. Sumption, 117 Ind., 1.

Walsh vs. State, 142 Ind., 557.

"The law has carefully protected the owner of property, after giving in his list of taxable property which has been accepted without objection by the assessor, from any change except on notice to the owner."

Cleghorn vs. Postlewait, 43 Ill., 431. Cited in Lehman vs. Robinson, 69 Ala.

"Every property holder has a right to a hearing in such a case and an assessor cannot secretly re-assess such an owner without giving him an opportunity to contest the justice of the charge. That rule is founded on the plainest principles of justice, and **is enforced by the guarantees of the Constitution.**"

Tolmon vs. Solomon, 191 Ill., 204.

And this rule is recognized in Georgia, the statute of which declares that changes shall not be made in the current year without notice.

Pol. Code, 840, 841.

Notice of reassessment must be given of changes of back taxes for past years. Such are the uniform decisions in the few instances in which courts have ever been called on to pass on the question of the assessment of back taxes without notice.

There are only a few cases directly in point, for the reason that usually back taxes are either collected by suit, in which the party has an opportunity to be heard; or else the statute itself provides for notice and an opportunity to contest the back tax charge before it becomes final. As far as we have been able to find, there is no exception to the rule requiring notice.

In every case **where the question has been raised and the taxpayer has planted himself upon the right to the hearing,** granted in the Due Process Clause of the Constitution, the courts have recognized and sustained such right to a hearing in assessment of back taxes.

The text books, the State decisions, and, as we shall attempt to show the Federal decisions, sustain the following propositions:

The assessment of back taxes on omitted property involves the determination of value; is judicial in its nature, and notice and a statutory right to be heard in back tax assessments are essential to the Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The text books recognize this principle:

"Whenever a re-assessment of any kind is made, whether to validate a void assessment, or to **reach omitted property**, or to secure a re-valuation of the property, undervalued or overvalued, there is the same necessity for notice and hearing as in the case of an original assessment."

Gray on Limitations of Taxing Power, Sec. 1295, p. 639.

"In **adding omitted property** to the tax duplicate, a notice and hearing must be given to the owner,"

27 Am. & Eng. Enc., 705.

The proposition is exactly and forcibly expressed in Myers vs. Shields, 61 Fed. Rep., 713, where, in construing the Ohio Back-Tax Act, it was held that:

"A proceeding by which an assessment for **taxes of years preceding the current year** is entered on the general tax duplicate, without notice or opportunity to be heard; which assessment is a cloud on the title of his realty, and a lien on his property, enforceable by a distraint in sale, without suit in court; deprives him of his property, without due process of law, and is violative of the Fourteenth Amendment of the Constitution of the United States."

The Redwood case, 42 N. W. Rep., 475 (affirmed 159 U. S., 526) passed on the validity of Back Taxes on Omitted Property in Minnesota. The assessments were sustained by the State and Federal courts because it was shown that the statute provided for notice by publication, and gave full opportunity to be heard. But the State court distinctly recognized that notice was essential in back taxes assessments:

"Where, as in the present case, the tax is levied on property, not specific, but according to its value, to be ascertained by some person appointed for that purpose, undoubtedly the party is entitled to notice, and an opportunity to be heard."

In New York, the right to a hearing as to back taxes is recognized as existing, independent of any Statute.

"In respect to the assessment in 1865 of the alleged **omitted taxes** of 1864 against Plaintiff, I am unable to say how its legality can, for a moment, be maintained * * * I find nothing in the Act of 1865 which requires any special notice to be given of the re-assessment of omitted taxes for the previous year, or any special provision for the hearing of any party aggrieved * * * but I cannot suppose it was intended that this might be done without some form of notice, and as none is provided for in the Act, the same reference was intended to the general law relating to that subject.

"Under New York Laws. 1865, providing for the re-assessment of omitted taxes of a former year, this must be done before the roll is completed and notice must be given."

Overing vs. Foote, 65, N. Y. 269-277.

See Douglas vs. Westchester Co., 172 N. Y., 309.

"There must be nothing in the nature of a re-assessment without notice to the party affected * * * * * That rule is founded on the plainest principles of justice, and is enforced by the guarantees of the Constitution."

Tollman vs. Solomon, 191 Ill., 204.

The Supreme Court of Mississippi, in discussing the Back Tax Act and holding it void, says:

"When we consider the duty and power of the agent to collect taxes on property which has escaped taxation, the provisions of the law, are found yet **more objectionable.** As to such property, the agent, without notice to the taxpayer, and without giving him an opportunity to be heard, determines that certain property, at a certain valuation, could be assessed against a particular owner."

Adams vs. Tonella, 22 L. R. A. 350 (last Col.)

The necessity of notice in the assessment for back taxes was recognized in D'Antignac vs. City Council of Augusta, 31 Ga. 715, where, in reference to the effect of a failure to give notice in the collection of back taxes for ten years, Judge J[illegible]ins says:

"Shall it be said that after ten years of non-action, the defendant in error may cause a demand for taxes to be made,

then the taxpayer is a defaulter, then the return of execution **ex parte** against him whereby his property may be sold, and his title thereto divested, **without a hearing,**—a day in Court allowed him. We think not."

In Massachusetts it is held that having furnished the assessor with his list under oath the tax payer is entitled, before he can be assessed upon his property, to have them hear his statement or explanation in regard to it.

Moore vs. Street Commission of Boston, 134 Mass. 432.

So in California, after an assessor receives a taxpayer's return without objection and files his tax roll with the county clerk, the assessor has no authority to make any change whatever in his return, especially without notice to the plaintiff.

Gibbons vs. Adamson, 24 Pac., 51 (2 Col. Bot.)

A back tax assessment is either a new judgment or an amendment to an old judgment. In either event, notice is necessary, according to all of the analogies of the law; for, **after final judgment, whether by a Court or Tax Assessor, on the adjournment of the term, the party is discharged; the question is no longer sub judice, jurisdiction is lost, the original progress is a spent force, and a new process and opportunity to be heard is needed to support an amended or a new judgment.**

This principle is universally recognized.

"After the term at which judgment was rendered, the power of the court over the parties and over its record is gone, except to purge clerical errors."

Philips vs. Negly, 117 U. S., 678 (bot.)

"At the end of the term the parties are discharged from further attendance on all causes decided, and we have no power to bring them back."

Brooks vs. R. R. Co., 102 U. S., 107.

During the term the judgment is **in fieri,** and may be subject to change without notice.

But even where there is a judgment by default, the court cannot, on motion, vacate the judgment at a subsequent term, allow an amendment increasing the **ad damnum,** and enter a new judgment for a larger sum.

Radcliffe vs. Barton, 154 Mass., 157.

And a statute that authorized a judgment to be set aside on an affidavit, without notice, was held to be unconstitutional for want of due process of law.

Pierce vs. Kitzwiller, 19 W. Va., 564.

And in Porter vs. Orient Ins. Co., 45; Atlantic Rep. 7 (4) 10 (1 col.), the Supreme Court of Connecticut recognized that under some of the old decisions in that State, changes could be made in a judgment without notice, but showed that since the adoption of the Fourteenth Amendment, a notice was necessary in order to afford due process. Plaintiff here was clear on the record, its answer was in; it was not in default, and there was no traverse of its return; a judgment had been entered on the accepted answer.

In New York it was held that if a plaintiff had entered judgment on the sworn answer for too small an amount, it may, by appropriate proceedings, **of which the defendant shall have notice,** be entitled to collect the proper amount. But here the omission of the amount of taxes was not a clerical error which could be corrected by an examination of the record, but an error of substance, the correction of which required notice to the opposite party, and which could not be corrected on motion.

See Bullard vs. Sherwood, 85 N. Y., 254.

The same principle was recognized in Pennsylvania in a decision peculiarly applicable to the facts here. The court said that the property having been omitted, not by accident or fraud, but under a construction of the law, the remedy of the State was by submission to arbitration, and not by a second assessment.

In re Monepenny's estate, 37 Atl. Rep., 589.

X.

The Original Notice a Spent Force.

In the fine phrase of Judge Cooley, eminent as a judge, pre-eminent on questions on taxation, the original notice is "a spent force." It had accomplished its work in bringing the taxpayer into the tax court, for the current year of 1895. When the return was accepted, the tax entered on the Digest, the books closed for the term, the taxpayer was authorized to "depart thence without a day."

"He was no longer under obligations to watch the proceedings. The public notice which he had, under the law, to appear if he desired to do so had then, so far as he was concerned, **spent its force,** and there was no more occasion for his remaining in attendance upon the board afterwards, lest the action taken be rescinded, than there is for a suitor who has obtained a judgment remaining constantly with the court as long as it remains in session, lest, at some time the judgment should be vacated in his absence and without his knowledge."

Judge Cooley in Griswold vs. Union Dist. School, 24 Mich., 262.

"When the defendants in this case delivered their list to the assessor without objection from him, they had the right to presume, and the law justified them in that presumption, that their valuation of the property was accepted, and would remain as delivered; and even if the assessor has authority to raise the assessment, he could not do this without notice to the party to be affected thereby. * * * After the assessment is made, it does not lie in the power of the assessors to raise the original assessment on personal property without notice to the taxpayer. * * * Whether judicial or not, it is immaterial to inquire because if the act contested here does indeed assume the **proportions of a judgment, it is a judgment without notice, and consequently void.**"

State vs. Spencer, 21 S. W. R., 837, (Mo.)

"Where statement of property subject to taxation has been made out and verified by oath of the party, returned to the proper officer and by him accepted as such, and the amount therein stated is entered upon the duplicate for tax-

ation, it cannot be that the legislature intended to put it in the power of the auditor to increase this amount without notice to the party interested."

Champagne vs. Smith, 7 Ohio State, 49.

It follows, therefore, that the effect of notice and process cannot be so construed as to operate as a trap by which, when a judgment is rendered, and the defendant discharged, a new judgment can be based on the old process or a substantial amendment be made in the existing judgment.

"Such a proceeding lacks every element of due process of law. It contained no notice to the party affected of the claim against him, or the action upon it, and no opportunity to contest the questions of fact or cross-examine the witnesses or the presentation, and no chance of being heard upon the questions of law involved, was given him. It construes without notice, condemns without a hearing, and renders judgment without trial."

In re Rosser, 105, Federal Rep., 568-569.

The Constitutional guarantee of Due Process cannot be circumvented by giving notice in the first instance and then changing the assessment by adding property without notice.

Chief Justice Campbell in Phillips vs. Township of New Buffalo, 31 N. W. R., 582 (a tax case), said:

"The right to be heard on the valuation would be nugatory if the board, after giving a party the redress he is entitled to, and leaving him satisfied with their conclusion, **then turn round and undo their judgment.**"

In Hovey vs. Elliott, 167 U. S., 415, it appeared that the defendant was actually guilty of a contempt, and, because of that, he was not allowed to be heard. The court said:

"Notice is only for the purpose of affording the party an opportunity to be heard upon the claim or the charges made. It is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to the party of the benefit of the notice would be, in effect, to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether."

If that language is appropriate to the case of a party actually guilty, how much more appropriate is it to a case where the taxpayer is admitted to have acted in good faith and reliance on the universal practice, supported by the language of the Supreme Court of the State that foreign stock was not here and, therefore, not taxable here.

Supreme Court of United States Holds That Notice is Necessary in Assessing Back Taxes.

This Court has recognized repeatedly the necessity for notice and opportunity to be heard in the assessment of back taxes. The Winona case, 159, U. S. 52; the Weyerhauser case, 176 U. S., 550; the Gallup case, 183 U. S. 205 recognized, in the strongest way, the necessity for allowing the taxpayer to be heard when he is back taxed on omitted property. The defendant claims that these three cases construed statutes which allowed notice as a matter of grace. He contends that they do not hold that the taxpayer was entitled to a hearing as a matter of right. On the contrary, the Federal question involved was whether the Statute afforded due process of law. If the taxpayer had not been entitled to notice under the Fourteenth Amendment, the cases would have been dismissed, for want of a Federal question giving jurisdiction. But assuming as a predicate that the taxpayer was entitled to a right and opportunity to be heard in the assessments of back taxes, this Court carefully considered the details of the State statutes, showing that in each instance, the taxpayer had been given notice by publication and afforded an opportunity to be heard by the Statute.

"A State statute which provides for the subjection of property which has escaped taxation in prior years, to the taxes of those years, does not deprive one of due process of law when opportunity to question the validity or the amount of the tax is given. Winona, etc., Land Co. vs. Minnesota, 189 U. S. 537."

In the case of Weyerhauser vs. Minnesota, 176 U. S., 556 (a back tax case), the court said:

"If, against what may be detriment in that (the back tax

assessment), the land owner can be heard, he is afforded due process within the rule announced by the authorities."

In the same case, page 557, the court said:

"The Constitution of the United States was satisfied if an opportunity be given to question the validity or **amount of the tax**, either before that amount is determined, or in subsequent proceedings for its collection."

In the **back tax** case of Gallop vs. Schmidt, 183 U. S., 307, it was said that:

"Due process of law is afforded litigants if they have an opportunity to question the validity, or the amount, of an assessment, or charge, before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered."

In Bristol vs. Washington County, 177 U. S., 147 (a back tax case), it was decided that:

"There was no want of due process, for while a non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded."

XI.

The Letter of May 25th, 1901 From Comptroller-General to Plaintiff Suggesting a Supplementary Return is not the Due Process of Law Guaranteed by the Constitution.

This letter appears in the printed Record, page 115. Paragraph 14 of the defendant's answer (printed Record, page 40) makes the contention that if the plaintiff had complied with the defendant's demand that it would have had Due Process of Law, but having failed and neglected to make the return as requested the plaintiff is not entitled to any further notice or hearing.

There are two sufficient answers to this position.

1. The letter was dated May 25th, 1901, and referred to taxes for the current year. The first execution issued

was issued October 27th, 1902 for taxes of the year 1900 and the petition was brought to restrain the execution of that year. Afterwards on January 23rd, 1906 the Comptroller-General assessed for the years 1895 to 1905, inclusive and issued executions for each year. This was done without any invitation whatever to make a return.

The Supreme Court of Georgia had decided at the October term 1905 that the "door of opportunity" was closed, and the Comptroller-General acted in accordance with the decision of the Court.

2. The mere invitation of the Comptroller-General to make a supplementary return, is not Due Process of Law. This was a recognition by him that the plaintiff ought to have Due Process of Law. The Due Process must come from the laws, not from the mere grace or favor of the person appointed to execute the law.

XII.

"Due Process Must be Predicated upon the Terms of the Statute, not upon Favor or Accident."

"It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be contested, not by what has been done under it, but by what may, under its authority, be done. The Legislature may prescribe the method of notice, and the mode in which it shall be given, but it cannot dispense with all notice."

Stuart vs. Palmer, 74 N. Y., 183, 188.

Each term and phrase,—"Due Process of Law,"—is important; it must be **due**,—that is, reasonable fair, just; it must be **process**, not a letter, nor an invitation to be present, or information as to the pendency of a suit,—but **process**.

It must be process of law, not of grace, or favor arising out of the inherent instinct of fairness on the part of the officer seeking to give the notice, which the Statute ought to have required; but opportunity to be heard must be demandable as a right.

It must be binding on the conscience of the officer, as well as the taxpayer, and compel the attention of the officer under the imperative obligation of the sense of judicial responsibility by an impartial and a right decision.

Kentucky Tax Cases, 115 U. S. 344.

Spencer vs. Merchant, 125 U. S. 356.

The court, in re Rosser, 101 Fed., 567, said:

"Such a course must be appropriate to the case and just to the party affected. * * * Opportunity to be heard must be such that he may cross-examine witnesses produced to sustain the claim, produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may if they desire, argue the justice and propriety of the judgment or order proposed."

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller vs. Holly, 176 U. S. 409.

"A notice not authorized by law is a nullity."

Kunts vs. Sumption, 2nd L. R. A.

Cook vs. Lasher, 73 Fed. Rep. 701.

Unless the statute provides for process and the right to be heard, the officer is without jurisdiction. He acts as an individual, not as a court, and the proceedings are **coram non judicie.** So essential to the validity of anything in the nature of a judgment is this satisfactory right to be heard, that:

Even if the Valuation had Been Correct, or if the Defendant had been Liable in Fact, the Assessment Would Still be Void, Because Issued Without the Right to be Heard.

"The fact that the defendant may have been liable, was immaterial in considering the validity of the judgment.

Whether, in fact, the individual has a defense, or by way of exemption, or is without defense, is not important. To assume that he has none, and therefore is entitled to no day in court, is to assume against him the very point he may wish to contest."

Reese vs. City of Watertown, 19 Wall, 123.

"It is not a question of harm to him, but the State's right to recover taxes depends upon notice."

Thorneburg vs. Mardell, 98 N. W. R. 301

"That the assessment might be relatively fair, or the same as would have been made had notice been given, is unimportant, if the owner is denied a **lawful right** to a hearing."

1 Cooley on Taxation (3rd Ed.), 632.

XIII.

The Georgia Statutes are Unconstitutional Because They do not Afford Due Process of Law in the Assessment of Back Taxes.

In the court below, the plaintiff contended:

1. That the Georgia statutes did not authorize the Comptroller-General to assess back taxes.

2. That if they did, they were unconstitutional, because they did not provide for a notice and an opportunity to be heard in the assessment of such back taxes.

The court, at great length, considered the first proposition, and decided that the Georgia statutes did authorize the Comptroller to assess omitted property for former years.

The court did not discuss the question of due process of law further than was involved in the one single sentence that the statutory "scheme was constitutional."

This, therefore, makes it necessary to consider what was the statutory scheme.

No Roving Commission with Power to Assess at any Uncertain Time.

Pol. Code, 813, provides that "in case of failure to make return, the comptroller must make an assessment from the best information he can procure, which assessment shall be conclusive."

Plaintiff contended that this section was limited to the current year; for, "if language can be construed as relating to assessments for the current year only, it will not be extended to embrace exceptional assessments of property omitted in previous years."

Parkinson vs. Jasper Co. Tel. Co. 67; N. E. R., 477.

"There must be a period when, for obvious reasons of policy, the assessment roll, in any given year, must be regarded as completed."

Overing vs. Foote, 65 N. Y., 276.

For if the assessors can go back one year they may go back indefinitely * * * such power would be impolitic and evil and expose all men who, whether ignorantly or wilfully, had, at any time, understated the quantity of their land * * * to vexatious or malicious prosecutions."

Sudderth vs. Briton, 76 N. C., 461.

Whiting vs. City Council of West Point (Va.), 17 S. E. R., 1; and Stockman vs. Robbins, 80 N. C., 196; Meade vs. Story, 93 N. W., 89.

Closed Books, Not Closed Door.

On the authority of these, and similar cases, plaintiff contended that the tax books closed on October 1, when the taxes for the current year became due and payable—or, in any event, the tax books closed on December 20th, when executions were required to issue for taxes then unpaid; that the books being closed, a new notice and a statutory right to be heard, was necessary before any entry could be made thereon in the nature of a re-assessment, or the addition of omitted property.

The State Supreme Court disapproved of this position, holding that, not the books, but the "door of opportunity" was closed.

In effect, it held that the books remained opened, but that the "door of opportunity" was closed, to prevent the citizen from being heard.

In other words, the books were open to the officers of the tax court to make back tax assessments, but the door of the court was closed against the citizen to be affected by the entry on the open book.

The court held that the failure to include property in a return did not relieve the taxpayer from his obligation to pay the tax which he had escaped, whether that escape was fraudulent, or in good faith, and that there was a failure "in a present duty."

But a party is as much entitled to a hearing on the question as to what is his present as to what was his past obligation. There must be a method by which the existence and extent of his present obligation is to be determined after a hearing. This was recognized in the case of Walker vs. Whitehead, 43 Ga., 551, (Reversed 16 Wall., 314), cited by Supreme Court of Georgia, for, there, the statute attempted to enforce the payment of a tax, not by an assessment without a hearing, but by a penalty, which penalty was held by this Court to be unenforceable. (16 Wall, 314.)

Comptroller's Implied Power to Back Tax.

Plaintiff did not contend that the acceptance of a return which did not include all its taxable property operated as Res Adjudicata, or estopped the State from thereafter collecting tax on the omitted property; provided, always, there was adequate statutory machinery requiring all persons similarly situated to make a return of the omitted property and an opportunity by statute to be heard on the validity and amount of the tax.

What the plaintiff did claim was that, under the existing statutes, the tax books were closed at the end of the current

year, and that there was no machinery for a hearing on the back tax assessments.

Answering this contention, the Supreme Court conceded that Pol. Code, 813, did not, on its face, authorize the Comptroller to back tax. It held, however, that, by implication, he was clothed with the same power in this respect as that possessed by the county tax officers. It then proceeded to show that the books were not closed, by reason of the provisions of Pol. Code, 949 (2), (11), 857 and 855.

The Court then quoted section 949 (2), (11), enumerating the "Duties of the Tax Collector:"

2. "To search out and ascertain, as far as possible, all polls and professions, and all taxable property not returned to the receiver, or not found on his Digest."

There is no suggestion of a hearing or notice in this clause. The Court then quoted Sec. 949 (11), which enumerates, as one of the duties of the tax collector:

(11.) "To issue executions against all tax defaulters * * * for any and every year preceding and including the years for which they are collected."

But the tax collector is like a sheriff. He is the ministerial officer who collects taxes. Plaintiff contended that this section authorized the collector to issue executions against persons whose names were on the tax digest, and who had not paid what the digest showed they owed. At any rate, there is no provision in this section for making assessments or giving the alleged delinquent an opportunity to be heard.

The Court then cited Pol. Code, 847, which provides:

"If a person fails to make a return, in whole or in part, it is the duty of the receiver to make the valuation and assess for taxation, and double the tax in the last column."

Plaintiff contended that this section necessarily related to the taxes of the current year, since the tax receiver was obliged to turn over the tax digest on August 1st of each year (Pol. Code, 838), and thereafter had no custody of the books. So far as the tax receiver was concerned, the book was not only closed, but it was out of his possession.

The Court then cited Pol. Code, 855, which provides that:

"Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default."

Plaintiff contended that this section was not only silent as to the right of the receiver to assess for back taxes **without a return,** but that this section was a codification of the Act of 1813 (Cobb's Digest 1059) passed at a time when, so far from authorizing the receiver to assess without a return, it required him to receive the return.

XIV.

Originally Back Taxes in Georgia Were Enforced by Suit.

The provision is found in the Act of 1804, Sec. 8 (Cobb's Digest, 1047), and Sec. 18 (Cobb's Digest, 1050). These two sections provide as follows:

Sec. 8. "If any person shall neglect to give in return of his taxable property, or shall be convicted of making a false return, he shall be liable to pay a fine of ten dollars for every hundred dollars valuation so neglected or concealed * * * to be recovered in any court having cognizance of the same."

Sec. 18 provided in addition, that:

"Every person neglecting to give in a list of his taxable property shall pay for every such neglect * * * 80 cents on every hundred dollars value * * * to be recovered by bill, plaint, or information before any court of record * * * provided, always, that such information, or presentment, shall be made within twelve months after such neglect or default."

In Gorman vs. Hammond, 28 Ga., 85, it was held that the provision in the Act of 1804 providing for the recovery, by suit, of the fine of ten dollars for every hundred dollars valuation concealed, had been repealed by the Act of 1845 as to double tax.

XV.

No Fixed Time and Place for Assessing Back Taxes.

Whatever the power to collect back taxes, and whatever the machinery, there is no fixed time, or place, when the assessment is to be made. From an examination of the statutes, it will be seen that both separately and collectively they provide for no notice and fix no time or place when the officer is to pass on the question of back taxes. Glidden vs. Harrington, 189 U. S., 257. As construed, they leave the back assessments suspended like the sword of Damocles to fall, not at a fixed time and place, not after notice and opportunity to be heard, but at the uncertain and arbitrary will of the officer, whenever he chooses to cut the hair, even though it might be, as here, many years after the same officer had received the return and considered it as a closed incident. This same officer, during those years, did not consider foreign stock taxable, and had they been included, would not have taxed the same. This officer lets the sword drop even though the judgment he issues is not "**responsive to the pleadings.**" Reynolds vs. Stockton, 140 U. S., 240 (bot). The only pleading was the return of the company, to which no objection was made, and no traverse filed, as required by Pol. Code, 812. The judgment had been entered on the then pleadings, and the tax due thereunder had been paid.

So that, even if the Comptroller is, by implication, clothed with the powers of the county tax officers, he is clothed with a power that is nugatory, since there is no statutory right afforded the delinquent to be heard.

XVI.

Practical Effect of Construction.

Inasmuch as all the powers held to be conferred upon the Comptroller are not expressed in Political Code, 813, but

some of the powers are derived by implication, it will make for clearness of illustration to consider that there was an Act expressly authorizing him to do exactly what he has done.

As things equal to the same thing are equal to each other, we would then, in effect, have a statute like this:

AN ACT.

To provide that where a taxpayer has **bona fide** made a return which has been accepted without objection, the Comptroller General or his successors, upon learning that the taxpayer owns property which, in excusable reliance upon universal practice and contemporaneous construction, was, in good faith, omitted from the accepted return, may, at any time, and without notice, assess said owner for back taxes and interest on said omitted property for seven years preceding such assessment, at a valuation to be fixed by the Comptroller without evidence, but from the best information he can obtain; and such assessment against such innocent **bona fide** taxpayer, though he did not conceal his ownership of such property, but, in common with all other citizens and the tax paying department, treated such stock as non-taxable, shall be conclusive. Such citizen being deprived of the right to be heard, and the door of opportunity being closed, as a penalty.

Such an act would be equivalent to a Bill of Attainder.

Peoples vs. Hayes, 140 N. Y., 484.

It would be worse than a bill of Attainder, for, to give notice during the current year, accept the return, and years after, without notice, to change the judgment, would be worse than no notice at all. One is an arbitrary denial of due process. The other would be for the sovereign to accept the return, and allow a citizen to depart on the idea that it was satisfactory, and then, later, subject him to the burden of a conclusive judgment issued without a hearing.

The inherent and changeless equity which entitles even a wilful wrongdoer to a hearing before he is condemned, is doubly due to one who innocently relied on the practice of the Comptroller General himself in treating foreign stock as non-taxable; especially where the Comptroller, in exercising the judicial functions of assessing values, was dealing with a case of stock which had no market value, and where it was peculiarly necessary to hear witnesses in order to determine a question of such doubt.

XVII.

Authorities Cited by State Court to Sustain the Proposition That Assessment Might be Made Without a Hearing.

The Plaintiff's pleadings alleged that the assessment issued in violation of the 14th Amendment, and in stating the issues, the Supreme Court of Georgia, in the opinion refusing the Injunction, **states that the Plaintiff alleged that the assessments were void because issued without due process of law.** With that single exception, the phrase is not again used. The constitutional question is not again mentioned, except in one short sentence, where the Court, after showing that the Georgia statutes closed the door of opportunity and deprived the plaintiff of the right to be heard as a penalty, said:

"Whether or not it is consistent with wise public policy, we do not undertake to determine, that it is not unconstitutional, we are fully satisfied."

To support this sentence upholding the validity of a statute providing for no opportunity to be heard, the Court cites Hager vs. Reclamation District, 111 U. S. 701, and Pittsburg R. R. v. Backus 154 U. S., 426, both of which are leading cases in establishing the proposition that notice is necessary at some stage, and that the citizen must be afforded an opportunity to be heard on the charge sought to be enforced against his property.

The other cases are not in point on the question as to whether the plaintiff was afforded Due Process of Law, for

1. None of the cases cited involved the question of Due Process of Law, and none of the cases discuss whether the Back Assessments issued in violation of the 14th Amendment.

2. These cases construe the Tax Statute. None of them involve the validity of the Statutes.

3. These cases applied to taxes for the Current Year, and relate to changes during the term, as to which the plaintiff had the right to be heard, because there was a time and a place fixed by the statute, when the citizen could be heard as to the changes.

XVIII.

No Jurisdiction to Fix Value or Give an Opportunity to be Heard on the Amount of the Tax in the Pending Suit.

After the Remittitur was returned to the Lower Court, and after the statute had been construed to deprive the plaintiff of the right to be heard, and it had been held that the assessment was conclusive, the defendants on the final hearing shifted their position and by an amendment filed January 30, 1906 Record 56 prayed that the court would find and decree that the true market value of the stock is as "assessed by the Comptroller-General."

The plaintiff objected to this amendment on the ground (Record, 14) that "there was no jurisdiction in the Superior Court of Fulton County to assess the said stock for taxation, nor to re-value said stock for the purpose of taxation."

The court ruled that it "could not, in this cause, decide or fix the value of said stock for the purpose of determining an amount for which executions for taxes should issue," but would hear evidence with a view of determining whether said assessments were excessive. Record 14.

The Supreme Court having in this very cause decided that the assessments were made conclusive by statute, it would have been worse than useless for plaintiff to have gone into the question of the re-valuation of the stock for the purpose of fixing an amount for which new executions should issue. The assessments were declared to be conclusive, and could not be set aside even if they were shown to be excessive unless there was **proof of fraud and corruption on the part of the officer.**

Besides, the plaintiff was contending that no tax whatever was due. The assessments were attacked, not only because they issued without Due Process of Law, but also on the ground that, as no one else had been taxed, or back-taxed, on foreign stock, plaintiff could not be taxed thereon; for, if everyone else was exempt, plaintiff could not be required to pay.

So that, the Legislature by its statute, the Supreme Court of the State, in construing the statute, and the Superior Court by a ruling in this cause, have held that plaintiff was not entitled to be heard before the Comptroller, nor was the plaintiff entitled to have the value of the stock fixed in the pending cause.

The case, therefore, is taken out of all the classes of cases referred to in the books where due process of law was afforded after, if not before, the assessment was made. The statute here did not give any right to a hearing before the assessment was made, and there was no opportunity thereafter to fix the tax before it became effectual and no right to contest its validity in a court of equity, as in Davidson vs. New Orleans, 96 U. S., 97, and Hager vs. Reclamation Dist., 11 U. S., 711.

In those cases the plaintiff was held to be entitled to a hearing as to the amount of the tax at some stage, and was not bound by the assessment which had been made without a hearing.

XIX.

Security Trust Company vs. Lexington 203 U. S., 323.

Since the argument in the Court below, this Court has rendered a decision which the plaintiff contends is exactly in point, and rules that the statute must provide a right and opportunity to be heard in order to support back tax assessments. This decision, plaintiff contends, answers the contention of the defendants that the original notice in 1895 would support the new judgment in 1905.

The Winona, Weyerhauser and Gallup cases, cited above, are charged with the **negative pregnant** that Back Tax assessments would be void unless the statute provided the right and opportunity for the property owner to be heard.

The case of Security Trust Co. vs. Lexington, 203 U. S. 323, **affirmatively declares** that the new notice is necessary, and that a conversation or letter announcing the officer's intention to Back Tax, is not sufficient unless the statute itself gave the citizen an opportunity to be heard. For convenience of reference, extracts from this opinion are here made:

"The Taxing Officer could not take any such tax books and without notice impose a conclusive assessment for Back Taxes, for the particular year the book had been made use of as an assessment book. Such assessments could not be enforced, unless the taxpayer could thereafter, at some time, as a matter of right, be heard upon the question of the validity and the amount of such tax. The general statutory notice as to the regular assessment proceedings cannot be regarded as notice of this special assessment made years after the completion of the old assessment," 203 U. S. 323. (Bot.) (Although the taxing officer, as a fact, in that case, gave notice of his intention to assess), there was no

"Notice made necessary by the statute in regard to such special assessment * * * there was no statutory obligation imposed on him to again examine the books, lest perchance they may have had an interlined assessment made in them, for the making of which the law provided no notice * * * subsequent assessments placed in such book, and

not appearing on any book when sent to the auditor by the assessor, would not be made under any statutory provision for notice, and would not afford the taxpayer an opportunity to be heard before the board of equalization in regard to the illegality of such tax." 203 U. S., 332 (bot.)

"If the statute did not provide for notice in any form, it is not material that, as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by Statute. Before this special assessment could be actually enforced the taxpayer must have an opportunity to be heard as to its value and extent. In Weyerhauser vs. Minn., 176 U. S., 550, it was held that the taxpayer was entitled to an opportunity to be heard before the tax would be enforced. . . The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessments before the Board of Equalization." 203 U. S., 333.

Applying this case to the present, it will be seen that it is directly in point. The Georgia Statute (Pol. Code 813).

1. Makes the assessment conclusive;

2. It made no provision for notice;

3. The door of opportunity was closed;

4. The plaintiff was held to be entitled to no notice, hearing, or arbitration;

5. The plaintiff was deprived of the right to be heard as a penalty;

6. **"And must bear the burden of the assessment made in conformity to the law,"** which gave no right to be heard:

7. As to the taxes for 1896 to 1902, and for which years the property had been assessed by the Comptroller, **"whether the property had been excessively assessed cannot now be inquired into."**

8. The void assessment for the years 1896 to 1902 were "ordered to proceed";

9. The plaintiff's freight office has been levied on under fi fa's issued on assessments which were made without an op-

portunity to be heard, and under the judgment ordering these executions to proceed, it is sought to take plaintiff's property by sale; i. e. the property is to be taken without due process of law.

It is true that in Security Trust Co. v. Lexington, 203 U. S. 323, the city collected what was ultimately found to be due as Back Taxes. But the collection was made, not under the void assessment, issued without due process of law, but by virtue of a decree rendered after a hearing which found affirmatively what was the amount of tax due, and which finding was for a sum much less than that for which the void assessments had issued.

Nothing of the sort was done in this case. No new judgment was issued, but the void assessments were ordered to proceed.

There was no re-valuation. On the contrary, the Record shows (R., 14) that the Judge of the Superior Court, in so many words, ruled that the Superior Court "could not, in this case, decide or fix the value of said stock for the purpose of determining an amount for which executions for taxes should proceed."

There was, therefore, no re-valuation for tax purposes, as in the Lexington case. 203 U. S., 325.

Although the Judge of the Superior Court held that he would hear evidence for the purpose of determining whether the assessments were excessive, yet the plaintiff was crushed in the folds of a "vicious circle," for its evidence that the assessments were excessive were met by the decision of the Supreme Court that, in the absence of an allegation of fraud and corruption on the part of the Comptroller.

"Whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case, (Opinion on Injunction Case) it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessments made in conformity to law."

XX.

The Central Railway and the Georgia Railroad are the only Two Persons in Georgia Who have been Proceeded Against for Back Taxes on Foreign Stocks, and Nobody Else has Ever Made Return of Foreign Stocks for Taxation.

The taxability of shares of stock is a new discovery of the Comptroller-General's. May 25, 1901, was the first time the question was ever mooted. This was the day he first called attention of the plaintiff to the matter, (printed Record page 115); on the same day, it appears from the affidavit of the Attorney-General (printed Record page 120) that he submitted the question to the Attorney-General, whether said stock was subject to taxation.

The record contains an admission, page 80, that these two companies are the only persons owning foreign railroad stock proceeded against for taxes on this kind of shares.

The defendant's answer (printed Record page 47) "Answering said paragraph further, defendants say that even to this hour they know of no person or corporation resident of this State owning stock in any corporation whose shares are taxable in this State, save only the petitioner and the Georgia Railroad & Banking Company."

The Court will take judicial notice of the fact, without any proof, that there are many persons resident in the State of Georgia who hold stock in foreign corporations, that being a matter of common experience and of common knowledge.

Minnesota vs. Barber, 136 U. S., 321.
Phillips vs. Detriot, 111 U. S., 606.
Brown vs. Piper, 91 U. S., 42.
Southern Ry. vs. Covenia, 100 Ga., 46.
Watson vs. R. & D. R. R., 91 Ga., 226.

But the Comptroller-General has relieved us from the necessity of proof on this subject, because in his Official

Report for the year 1903, which was issued after he issued the execution against plaintiff, on October 27, 1902, he has said (printed Record, page 80, this brief, page 15), "notwithstanding this, I belive I am correct in saying that little, if any, of such stock in this State are returned for taxation, the owners claiming that there is no statute providing specifically for their taxation, and refusing to return them." The Comptroller-General also said in his Official Report (printed Record, page 80, this brief, page 15), "stock in foreign corporations of this State should be required to be returned for taxation in this State, it being claimed by the owners of such that there is no statute of Georgia which specifically requires their return for taxation. This item of property would add several million dollars to the taxable property of the State."

Although the Comptroller, in his Official Report, says that this class of property, if taxed, would add several million dollars to the taxable property of the State, under the strongest kind of pressure he has not been able to show that a single solitary soul has ever returned property of this kind for taxation, or been proceeded against by him, or by other taxing authority of the State.

On the contrary, the plaintiff has proved by the affidavits of the tax receivers and tax collectors of forty-five different counties in the State, which affidavits cover a number of years, that it has been the uniform and universal custom not to return stock for taxation, and that it is the universal and uniform custom of the taxing officers not to require its return. This is the only method by which an habitual practice, which is not the result of any written or oral compact, could have been proven. Southern Ry. vs. N. C. Cor. Com., 104 F. R., 700.

This evidence, in connection with the admission of the Comptroller-General, in connection with his Official Report and with the fact that the question was not even mooted by him until this case originated, proves as conclusively as a negative proposition can possibly be proven that it was the habitual, universal, systematic and intentional purpose of the taxing authorities not to require return of this species of property.

We are not concerned with the future. This case relates to back taxes.

It may be the purpose now of the tax authorities to require returns of this species of property in the future, but the proposition we maintain is that they have not done so in the past. That nobody else has been back taxed or will be.

XXI.

This Stock was Taxed to Plaintiff by the Comptroller-General on the Basis of its Full Value, Whereas it is the Universal Custom to Tax Property at not more than Sixty-Six and Two-Thirds (66 2-3) Per Cent of its Value.

Returns of all property made by railroad companies in Georgia are made to the Comptroller-General. The facts in reference to the custom of the Comptroller-General's department are stated on pages 16 and 17 of this Brief. His custom, as shown by the evidence, was to tax property at not more than 66 2-3 per cent of its value. This is the well-understood custom in the State of Georgia.

XXII.

Where Undervaluation of Property Contrary to the Statute is Habitual, Intentional, and Systematic, Courts will Enjoin the Full Valuation of the Property on the Ground that such is a Denial of the Equal Protection of the Law.

In the Case of Coulter vs. L. & N. R. R., 196 U. S., 599, while this Court declined to enjoin the assessment it was because the proof did not make out a case of systematic and

intentional undervaluation. The principle is clearly recognized that if the proof had established an habitual, systematic and intentional undervaluation, an injunction would have issued.

This proposition is fortified by a long line of cases.

Judson on Taxation, Chapter 16.

Railroad and Telephone Co. vs. Board of Equalizers, 85, F. R., 312.

Chicago Union Traction Co. vs. State Board of Equalizers, 118 F. R., 557.

Ex Parte Bridge Co., 62 Ark., 461.

Board of Supervisors vs. Railroad, 44 Ill., 229.

C. B. & Q. Ry. vs. Board of Commissioners, 54 Kan., 781.

Cummings vs. National Bank, 101 U. S., 153.

Pelton vs. National Bank, 101 U. S., 143.

San Francisco National Bank vs. Dodge, 197 U. S., 70.

Randall vs. City of Bridgeport, 63 Conn., 321.

Taylor vs. L. & N. R. R., 86 F. R., 350.

Michigan Rd. Tax Cases, 138 F. R., 223.

Affirmed in Michigan Central vs. Powers, 201 U. S., 246.

XXIII.

It is not Necessary to Charge the Comptroller with Fraud, or to Impugn His Motives, if the Method He Pursued Resulted in a Substantial Denial of Equal Protection of Law.

Remarks of Judge Clarke in the well-considered case of Railroad and Telephone Companies vs. Board of Equalizers of Tennessee, 85 F. R., 305, are apposite.

"It is conceded and could not be controverted that the Bill contains no specific allegation of fraud on the part of

the Board of Equalizers. While I do not regard this as a controlling point at all, it must be stated, to avoid misapprehension, that, although acting with perfect honesty, if the Assessors or Board of Equalizers pursued methods calculated to bring about a substantial inequality in the taxable value of the properties here in question, as compared with other species of property in the State, the innocent intent in such a procedure would be no justification whatever, in law, for a wrong result. Full legal responsibility is recognized for the necessary, legitimate, and natural result of acts, and a systematic course of procedure and an innocent mistake about the matter does not change the effect. For legal purposes, all persons are presumed conclusively to contemplate and intend the necessary and natural result of their acts."

See, also, Taylor vs. L. & N., 88 F. R., 372, Agnew vs. U. S., 165 U. S., 36.

XXIV.

The Overvaluation of this Stock is Grossly Excessive.

The Supreme Court of Georgia, in 125th Georgia at page 605 held, "Whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case it was concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither averment nor proof that the assessment was the result of fraud or corruption on the part of the Comptroller-General; if there had been, a different question would have been presented." The Court, on page 604, held that the Superior Court of Fulton County having held, "that the evidence submitted does not show that the value of the stock placed thereon by the Comptroller-General is excessive," then this finding carried all the sanctity of the verdict of a jury and "the burden is upon it (the Railway Company) to show that the finding is entirely unwarranted by the evidence." The Supreme Court did not examine the evidence, and on the next page of the Decision found that the plaintiff was concluded on this point by having failed to make its return.

The method pursued by the Comptroller-General produced a result, which, when compared with other property taxed by his department, was grossly excessive. The holder of this stock was taxed twice as much as the highest-taxed railroad property in the State of Georgia. The facts and calculations as to the overvaluation are set forth in this Brief at pages 17 to 21, inclusive.

The point is that the method of the Comptroller-General is wrong and, regardless of his purpose, or his intention, the method produced a grotesque result and, in effect, denied plaintiff the equal protection of the law in that the property was taxed to it twice as high as the similar property of any other person in the State of Georgia.

XXV.

An Administrative Denial of Equal Protection of Law is Necessarily a Question of Fact and should be Reviewed by This Court.

The question is necessarily one of fact, the law itself is equal, the point is that the law has been administered unequally. The propostion makes an issue of fact. If the verdict of a jury, or the decision of the Courts of Georgia is conclusive on this question, then the Supreme Court of the United States, in effect, has no jurisdiction left in the matter because, before it can decide the question, a subordinate tribunal has decided it conclusively. The verdict of a jury is, of course, persuasive and where there is any real conflict in the evidence, the Courts follow the verdict of a jury on a question of fact; but, in this case, while the Superior Court of Fulton County found that the assessment was not excessive, the Supreme Court of the State found that we were precluded on that question by our failure to make a return.

The Supreme Court of Georgia, in this case, held that it was necessary for the plaintiff to establish its case so that

there must be "certainty of every intent." It is difficult to understand precisely what the Court meant by this phrase. The evidence that the plaintiff has brought to bear upon the case has been as direct and as positive as the nature of the case will permit. The great preponderance of the evidence is with the plaintiff. If Courts regard preponderance of evidence, then this is a case where the great and overwhelimng preponderance of the evidence is with the plaintiff. If State Tribunals are free to decide cases which and overwhelming preponderance of the evidence is with involve an administrative denial of the equal protection of the law, when there is barely a scintilla of evidence to support the finding, then the State Tribunals can substantially nullify this provision of the Federal Constitution.

Our contention is that there is substantially no conflict in the evidence, and that the evidence produced by the defendant did not amount to a scintilla of evidence.

The evidence is set forth in the statement of facts and, we maintain, thoroughly fortifies our position.

This Court frequently considers a question of fact.

In Yick Wo vs. Hopkins, 118 U. S., 373, where, on an agreed statement the lower Court had found one way, this Court reached an entirely different conclusion.

In Coulter vs. L. & N. R. R., 196 U. S., 610, this Court carefully examined the testimony and reversed the lower Court for the reason, among others, that the prevailing testimony was that no scheme (of discrimination) was entertained.

In Smythe vs. Ames., 169 U. S., 466, there was a most careful view of an enormous volume of evidence.

In San Diego Land Co., vs. National City, 174 U. S., 760, the Court said: "there is evidence both ways;" and on an examination of that evidence held that the rates did not take the property without due process. It seems to us that, in order to determine the point that there has been an admisistrative denial of the equal protection of the law, that it is

necessary for the Court to look into the evidence; and the mere fact that the Superior Court of Fulton County found specifically that the valuation was not excessive, and found generally in favor of the defendant, is neither conclusive nor compelling—it is merely persuasive, and nothing more—and if this Court should find that the great preponderance of evidence is with the plaintiff, then the plaintiff ought to have the judgment of the Court on this point, especially in view of the fact that the Supreme Court of Georgia has decided we were concluded on this question by our failure to make a return.

XXVI.

The Supreme Court of Georgia Holds that Foreign Stock is not Taxed by the Constitution, but Solely by Virtue of the Act of 1885.

No tax has ever been paid on a share of Foreign Stock in the State of Georgia. Citizens and tax officers alike universally treated it as not taxable. In 1901, the Comptroller obtained an opinion from the Attorney General who held that it was taxable. A test case was made in the United States Court, and this Court, reversing the Circuit Court, and the Court of Appeals, held that Foreign Stock was taxable by virtue of the self-executing provision of the Constitution of Georgia, which requires that all property subject to be taxed should be taxed,—L. & N. R. R. vs. Wright, 195 U. S.

The plaintiff contended that if stock was "property" then Domestic stock was as much subject to be taxed as Foreign: that to tax plaintiff on the Foreign Stock, and to exempt the holders of Domestic Stock, was to violate the Uniformity Clause of the Constitution of Georgia, thereby also denying to petitioner the equal protection of the law.

The Supreme Court of Georgia, in effect, conceded that this contention was correct if the facts were correct, and, therefore, it elaborately dealt with the question and held:

1. That the Constitution of Georgia did require all **property to be taxed.**

2. That while, in a certain sense, stock was "property,"

it was not property in the sense of the Constitution; that stock had no inherent, or intrinsic value, and was, therefore, not that class of property taxed by the Constitution.

3. That while stock was not property within the sense of the Constitution, and not taxable by the Constitution, it could be made taxable by an Act of the Legislature. That such an Act had been passed in 1885.

XXVII.

Contemporaneous Construction of the Act of 1885 that Foreign Stock was not Taxable, had the Effect of a Judicial Determination. The Decision in 1905 That such Stock was Taxable will not be Given a Retrospective Effect.

The Supreme Court of Georgia, having declared that Foreign Stock was not taxed by the Constitution, but only by the Act of 1885, the Statute, if valid, could be abrogated by any of the ways known to the law. Among the recognized means by which this could be accomplished, was general and long-continued practice and contemporaneous construction of the taxing department, that such stock was not taxable.

Considering the injustice that would inevitably result from disturbing a long-continued and general construction of an Act, (8 Cyc. 738, 736);

Considering that the back tax now would put the burden on present stockholders, which should have been borne by the stockholders of the current years past, (125 S. W. 1042. 103 Fed. Rep. 528);

Considering and applying the maxim **communis error facit jus** (Ezekeil vs. Dixon, 3 Ga., 153);

Considering that the law is not intended as a trap to catch those who rely on the current and received opinion of the taxing officers;

Considering the natural equity and constitutional provisions which must even control States when they seek to impose penalties for acts of omissions which, at the time, were considered lawful by State and citizens alike;

The Court will treat the construction given by the taxing officers as having "**The force of judicial determination.**" Bruce vs. Schuyler, 4 Gilman, 221,—46 Am. Dec. 450;—Cook County vs. Healy, 78 N. E. Rep., 625.

The contemporaneous construction, thus having "**The force of judicial determination,**" will be applied "**In analogy to the principle of res adjudicata,**" and the correct decision will be given a prospective, and not a retrospective effect.

It is to be noted that this case does not involve the financial system of the State. It does not jeopardize the revenues of the Government for the current year. It is proceeding concerning taxes for years which have passed, and is not against a large number of the people, but only against two, and these two, it is conceded, acted in good faith, and in accordance with the contemporaneous construction.

Under the facts, the decision declaring that this contemporaneous construction was incorrect:

"Will not be allowed to have greater effect than a simple repeal, sustaining all acts done and all judicial proceedings had under it before such declaration, in analogy to the principle of res adjudicata." Herndon vs. Moore, 18 S. C.

In Taylor vs. Ypsilanti, 105 U. S. 60 (2), citing Ohio Life Insurance Company vs. Deboldt, 16 Howard, 416,-432, this Court showed that not only the decisions of the Courts, but the practice of the Departments of the State Government, would be considered in determining whether a new rule of construction was to be given only a prospective effect.

XXVIII.

This Doctrine of Contemporaneous Construction has been Applied in Tax Cases.

The Supreme Court of Kentucky in Franklin County vs. Louisville & Nashville, 25 Am. & Eng. R. R. cases, 535, held that where there had been a failure to list property, because of a decision that such property was not subject to taxation, the fact that it was subsequently decided that the law was misinterpreted will not authorize the collection of the tax on the same property during the period which the law, as announced and understood, did not require such property to be listed. (H. N.) * * * Rights were acquired and duties performed in accordance with the then law as announced and understood * * * It is equally just that the same rule should apply as to duties required of them, such as listing of their property for, or the payment of, taxes. Otherwise, they would not know when or how to act safely as to investment.

The attention of the Court is called to the case of Ratterman vs. Phipps, 4 Ohio Decisions, 453, which was a case much like the present in that the State attempted to back-tax a citizen on property which he had omitted to return, because of the general understanding in the community that the property was not taxable. The taxing officers there treated him as a defaulter just as the Comptroller did the Central Railroad in this case, and it was argued that his ignorance of the law afforded no excuse. The Court said:

"To adopt this proposition under the circumstances of this case would be iniquitous, pure and simple. For thirty-four years, this stock was not only regarded as non-taxable, but it was a matter of public notoriety that the stock was of non-taxable character. Investors sought it not only because they believed it non-taxable, but because by universal custom and opinion, the fact was established that it was non-taxable * * * While custom did not make the law for this stock, yet it is established that the custom made a characteristic and attached it to the stock which was that of non-taxability. The taxing department of the State, which was of jurisdiction here, had for that length of time not only failed to tax the stock, and concurred in the general opinion and maintained the practice of non-taxing, but declined to tax when the ownership of the stock was dis-

closed to them. "To stop his mouth with any such phrase as 'ignorance of the law, excuses no one, would be to throttle him with a presumption so falacious as to be ridiculous * * * To brand him as a defaulter because he had no individual opinion against the opinion of the taxing department, would be to work out in the administration not justice but a **reductio ad absurdum.**"

It so happens that there is a Georgia case dealing with facts almost identical.

In Mayor of Macon vs. Jones, 67 Ga., 489, it appeared that for many years the City of Macon had failed to tax its own bonds. In 1881 the Treasurer issued twelve tax fi fa's against Jones for taxes on $14,000 of bonds for the years 1870 to 1881. Jones admitted the ownership, but sought to enjoin the fi fa's on the ground that the bonds were not taxable, and on the further ground that "the city had never before demanded taxes from any one on such bonds, although it knew that many of them were held in Macon."

The city made the same reply that the Comptroller does here, and declared its purpose to tax all bonds whenever they might have the knowledge that others in the city owned them, but said that the council did not know who owned the bonds, because they were transferable by delivery. Judge (afterward Chief Justice) Simmons granted the injunction. In the opinion, Judge Jackson, after discussing the taxability, used language that embodies the spirit of the Fourteenth Amendment. He said:

"Further, we do not see clearly the fairness of enforcing a tax ordinance of former councils of the city, when those councils did not enforce it themselves, upon one citizen to the exclusion of others, especially—and more especially, when another has been relieved by council from a like imposition * * * in view of all the facts set out in this record, we cannot say that the chancellor, in the exercise of the power which the great principles of equity place in his hands to protect the weak against the strong, and shield the citizens against the corporate powers of the city, erred in the grant of this injunction."

There is another Georgia back-tax case which embodies the same principle. When back taxes were sought to be collected under similar circumstances, the Court asked whether an equitable bar should not be applied when, "on account of the lapse of time, and for other sufficient reasons,

it would be inequitable, or unjust, to enforce collection." Staten vs. S. F. & W. Ry., 111 Ga., 803.

XXIX.

As a Result of the Contemporaneous Construction from 1895 to 1902 that Foreign Stock was not Taxable, the Failure to Tax Other Persons during the same Years, and Plaintiff's Reliance on the Universal Practice and Contemporaneous Construction; it Cannot be Treated as a Defaulter nor Deprived of the Right to be Heard as a Penalty, nor Taxed when Every One Else has been Exempt by Reason of the Contemporaneous Construction.

The Fourteenth Amendment is not only intended to secure to the citizen the right to be heard, but it is intended to preserve fundamental rights, and to prevent oppressive legislation. In determining those questions, the inherent rights of the party and the principles of natural justice must be considered.

Due process of law, or law of the land, does not mean a statute passed for the purpose of working a wrong. Taylor vs. Porter, 4 Hill, 155. And no statute can authorize a judgment that is not in conformity **with natural justice.** 187 U. S., 51. No amount of notice, no formality of proceedings, can give validity to a judgment that is **arbitrary, oppressive, or violative of fundamental rights.** Howard vs. Kentucky, 200 U. S., 167. Or, that work out an **inherent injustice.** Chicago R. R. vs. Chicago, 166 U. S., 226. Otherwise, the constitutional safeguard would be a **mere "rope of sand."** 666, 165 U. S., 154.

In other words the intent set out in the Preamble to **"establish justice"** is guaranteed by the requirements of due process. Justice—not merely a hearing—but justice, primised in the Preamble, is to be secured and insured by

the command for due process of law in the Fourteenth Amendment.

Now, here was a case where there was certainly "excusable neglect," and "probable cause" justifying the plaintiff in relying on the practice of the Taxing Department and the contemporaneous construction of the law. The Comptroller himself was so much in doubt as to whether foreign stock was taxable, that in May 1901, he asked the opinion of the Attorney General.

Two courts and four judges (Judge Newman in the United States Circuit Court and the Court of Appeals) held that the stock was not taxable, and supported their opinion by quotations from the Supreme Court of Georgia in Wright vs. Southwestern, 64 Ga., 799.

When this Court held that such stock was taxable, it put the decision on the self-executing provisions of the Constitution of 1877. When the Supreme Court of Georgia decided this case, they held that foreign stock was not property taxed by the Constitution, but that it was a peculiar class of property having no inherent value, but was subject to be made taxable by a Statute.

XXX.

This was not a Case of Ignorance of the Law, but of Reliance on the Law.

In a case where the practice was one way and the law was ultimately decided to be another; where courts differed as to results, and where those agreeing as to results, disagreed as to reasons; there was certainly an "excusable neglect" on the part of the plaintiff in failing to return the property. It certainly had "probable cause" for omitting to return the shares.

Now to treat it as a defaulter, and to punish it as such is

in effect to punish it by an **ex post facto** law. To deprive it of the right to be heard as a penalty; to make that an offence which was not considered unlawful at the time it was committed, is equivalent to a Bill of Attainder. To follow that up by a "sentence" (Chicago, etc. R. R. vs. Chicago 166 U. S., 235) and to close the "Door of Opportunity" is to deny it due process of law, for it is deprived of fundamental rights. It was not only deprived of the right to be heard, but it was punished for an act innocent at the time of commission. In the language of the **Ratterman** case, "**to throttle it with a maxim** that '**ignorance of the law excuses no one**' " • • • "**is to work out hardship and oppression;**" to punish for no crime, but to make a crime out of that which was universally regarded as innocent. For this is not a case of ignorance of the law, but of reliance on the law as administered by the Taxing Department; and such reliance cannot be converted into an offense subjecting one to a great and onerous penalty, which penalty, not only deprives one of the right to be heard, but in effect, subjects him, under the name of "Taxes," to a fine, by which he is made to pay, where no one else is made to pay, on an assessment that was itself excessive.

Respectfully submitted,

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For Central of Georgia
Railway Company

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APPENDIX.

Statutes of the State of Georgia Material to This Case.

(ACT OCTOBER 20, 1885, GA. ACTS 1885, P. 28.)

"An Act to provide for the correct returns of the property in this State for the purpose of taxation, and for other purposes.

"Section 1. Be it enacted, by the General Assembly of the State of Georgia, That for the purpose of having a full and correct return of the real and personal property in this State, it shall be the duty of the receiver of tax returns to present a list to each tax-payer, which shall contain the following: * * * The amount of capital invested in stocks of companies, other than such companies as are required to be returned by the president, or their agents, either to the Tax Receiver or the Comptroller-General?

"Section 2. Be it further enacted that personal property shall be construed for purposes of taxation, to include all goods, chattels, moneys, credits, and effects, whatsoever they may be, all ships, boats, and vessels belonging to inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due to the person to be taxed, all stocks and securities, whether in corporations within this State or in other States, owned by citizens of this State, unless exempt by the laws of the United States or of this State."

(GA. ACTS 1886, P. 24.)

"An Act to amend an Act entitled 'An Act to provide for the correct returns of property in this State for the purpose of taxation and for other purposes,' approved October 20, 1885, so as to provide additional questions to be

submitted to tax-payers, on lists to be furnished them by the receivers of tax returns, as set forth in the first section of said Act, and to provide that said lists and the tax digests issued by the Comptroller-General shall be uniform; also by altering the third section of said Act as to the manner of taking the oath therein prescribed and for other purposes.

"Section 1. Be it enacted, by the General Assembly of Georgia, That Section First of the above recited Act be, and the same is hereby amended by striking out all of said section after the word 'following' in the fifth line of said Act, which is the enumeration of questions to be submitted to taxpayers, and inserting in lieu thereof, the following * * * The amount of capital invested in stocks of companies other than such companies as are required to be returned by the president or their agents to the Comptroller-General?"

(GA. ACTS 1888, P. 19.)

"Section 15. Be it further enacted, by the authority aforesaid, That in returning property for taxes, all property shall be returned at its value, promissory notes, accounts, judgments, mortgages, liens of all kinds, and all choses-in-action shall be given in at their value, whether solvent or partially solvent. Every person shall return for taxes, all jewelry and all other property of every kind owned by his wife and minor children, unless the members of his or her family return their property for taxation. In addition to the questions now propounded to tax payers by the tax receivers, questions shall be framed by the Comptroller-General to reach all property upon which a tax is imposed by this Act, and especially the following questions: * * *

"Third. Whether solvent or partially solvent, give the value of your bonds, stocks of non-resident companies or corporations or of companies or corporations in this State whose capital stock is not returned by the president of such company or corporation, all accounts, notes, judgments, mortgages, liens and other choses in action of every kind, whether such bonds, stocks, notes, etc., are held by the tax payer in Georgia or held by some other person for him, either in or out of this State. There shall be no deduction from the value of property returned for taxes on account of any indebtedness of such taxpayer."

(CODE SECTION 3070.)

"**What is.** Personalty, or personal estate, includes all such property as is movable in its nature; in fact, every-

thing having value inherent in itself, or the representative of value, and not included in the definition of realty. Stocks representing shares in an incorporated company holding lands or a franchise in or over lands are personalty."

(CODE SECTION 776.)

"**Bonds, notes, etc., of non-residents; bonds of other States.** Bonds, notes, or other obligations for money, on persons in other States, or of other States, or bonds of corporations of other States, and shipping, are the subjects of return and taxation in this State."

(CODE SECTION 778.)

"**Taxes charged against whom.** Taxes are to be charged against the owner of property if known, and against the specific property itself if the owner is not known. Life tenants, and those *who own and enjoy the property* (italics ours) are chargeable with the tax thereon. Hence, while the public may treat property as belonging either to the maker or the holder of a bond for titles, when the latter is in possession, yet as between the parties the one receiving the rents or enjoying the use is liable for the tax."

(CODE SECTION 805.)

"**Returns and taxes, etc.** The returns of all railroad and insurance and express companies, and agents of foreign companies, authorized in this State, shall be made to the Comptroller-General by the first day of May in each year, and the taxes thereof paid to the State Treasurer by the first day of October, and not later than December twentieth, of each year."

(CODE SECTION 812.)

"**Returns to Comptroller must be itemized.** Whenever corporations, companies, persons, agencies, or institutions, are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller-General, for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other matters

required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the Comptroller-General, and if in his judgment the property embraced therein is returned below its value, he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned as aforesaid, below the true amount, or false in any particular, or in any wise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice and have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators, one chosen by himself, and one chosen by the Comptroller-General, with power to choose an umpire in case of disagreement, and their award shall be final."

(CODE SECTION 813.)

"**When no return Comptroller to assess.**. In cases of failure to make return, the Comptroller-General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions."

(CODE SECTION 879.)

"**When there is no return.**. When there is no return by which to assess the tax, the Comptroller-General shall, from the best information he can procure, assess in his discretion."

(CODE SECTION 855.)

"**Taxes for former years, how returned and collected.** Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest."

(CODE SECTION 814.)

"**Collection of tax, how enforced.**. In all cases of default of payment of taxes upon returns or assessments, the Comptroller-General shall enforce collections in the manner now provided by law."

(CODE SECTION 874.)

"**Defaulting corporations.** If any corporation, company, person, agency, or institution, who are required to make their returns to the Comptroller-General, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the State Treasury, the Comptroller-General shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties."

(CODE SECTION 839.)

"**In case of false return, tax receiver to assess value.** Each return shall be scrutinized carefully by the tax receiver, and if in his judgment he shall find the property embraced in the return, or any portion of it, returned below its value, he shall assess the value at once or within thirty days thereafter."

(CODE SECTION 840.)

"**Subsequent proceedings.** If such assessment is not made by the receiver **instanter,** he shall give the taxpayer notice of his assessment, and in either case it shall be the taxpayer's privilege to have it left to three disinterested persons, one of whom he shall select, the other shall be selected by the receiver, and these two shall select a third if they disagree, a majority of whom shall fix the assessment."

(CODE SECTION 876.)

"**Penalty, where there is no special provision.**. The penalty or default tax on banks, railroads, and other corporations, where there is no special provision, shall be three times the amount of their lawful tax."

(CODE SECTION 847.)

"**Defaulters to be doubly taxed.** If a person fails to make a return, in whole or in part, or fails to affix a value to his property, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain, and having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made."

(CODE SECTION 848.)

"**Property not returned to be doubly taxed.** If there is taxable property, real or personal, in a county, that to the satisfaction of the receiver, when he comes to conclude his digest, is not returned by any person, and he does not know the owner or possessor, it is his duty to assess and double-tax it, describing it particularly; and the same power is conferred on the tax-collector as to such property when not assessed, or overlooked by the receiver."

(CODE SECTION 949.)

* * * * * * * * * * *

2. "To search out and ascertain as far as possible all polls and professions, and all taxable property not returned to the receiver or not found in his digests."

* * * * * * * * * * *

11. "To issue executions against all tax defaulters who are residents of the counties in which said tax-collectors are holding their offices, for any and every year preceding and including the years for which they are elected, and to collect the tax due from said defaulters and pay over the same to the proper authorities."

(CODE SECTION 2771.)

"**Absolute deeds and not mortgages.** Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage."

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM.

No. 85.

CENTRAL OF GEORGIA RAILWAY COMPANY

vs.

WILLIAM A. WRIGHT, COMPTROLLER-GENERAL, AND JOHN W. NELMS, SHERIFF OF FULTON COUNTY.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

The question involved in this case is the taxability in Georgia of fifteen thousand shares of stock of the Western Railway of Alabama, a foreign corporation, owned by appellant, a Georgia corporation. The stock has been adjudged taxable in Georgia by the highest court of that State. A writ of error has been filed by appellant to that judgment. The assignment of errors consists of twenty in number, which may be reduced really to two questions, each resting upon the Fourteenth Amendment of the Constitution of the United States. They may be stated:

First. A claim by appellant of the denial of the equal protection of the laws, and

Second. That its property is being taken without due process of law.

I.

DENIAL OF THE EQUAL PROTECTION OF THE LAW.

The denial of the equal protection of the law is based upon the claim that appellant is only one of two railroads in Georgia owning shares of stock in a foreign corporation against whom the tax is sought to be collected and, further, that the value placed upon the shares of stock in controversy for taxation is higher relatively than other property in the State of Georgia is taxed.

DENIAL OF DUE PROCESS OF LAW.

The claim that its property is taken without due process of law is based upon the ground the Georgia statute under which the Comptroller-General acted in assessing its property for taxation affords no notice and no opportunity to contest with the State the value of the property; and for the further reason that appellant is not the owner of the stock in controversy and that the situs of said shares is not within the jurisdiction of the State of Georgia, and that a tax by the State of Georgia on such shares "is an attempt to tax property the situs of which is outside of the State of Georgia . . . . in violation of the Constitution of the United States and of the Fourteenth Amendment thereof, and that it attempts to deprive petitioner of its property without due process of law and to deny to it the equal protection of the laws."

NO FEDERAL QUESTION INVOLVED.

It is the insistence of the appellee in the light of this record that no Federal question is now involved and that this court should dismiss the writ of error.

"In order to warrant the exercise by this court of jurisdiction over the judgments of State courts, there must be some fair ground for asserting the existence of a Federal question, and in the absence thereof a writ of error will be dismissed, although the claim of a Federal question was plainly set up; and where by the record it appears that such a claim, although set up, had no substance or foundation the fact that it was raised was not sufficient to give this court jurisdiction."

185 U. S., p. 336; N. O. Waterworks Co. *vs.* Louisiana.

There must be a real and substantial Federal question existing in order to give this court jurisdiction to review the judgment of a State court, and if the questions raised are so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature the writ will be dismissed. Whether, therefore, a Federal question is involved in the case so as to authorize this court to retain jurisdiction it must appear from the record that there is color of merit, and in the absence of such color the court will dismiss it. A reading of this record will disclose that the claim of a Federal question is clearly without color of foundation.

THE MERE ALLEGATION OF A FEDERAL QUESTION NOT SUFFICIENT.

"But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. 'Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision, or decisions, of this court as to leave no room for real controversy, the motion to dismiss will prevail.' "

Equitable Life Assurance Society *vs.* Brown, 187 U. S., p. 311; and cases there cited.

APPLICATION OF RULE.

Trying this case in view of the foregoing rule and in the light of the record it will be observed the claim of the denial of the equal protection of the law is unsupported by any evidence whatever. On the contrary, it is shown affirmatively by the evidence of the officer assessing the tax that he knows of but one other citizen of Georgia owning shares of stock in foreign corporations and that he is proceeding to collect the tax from it on such shares. This issue was submitted to the

judge who by agreement was authorized to try that question without the intervention of a jury, and who found that there was no discrimination as to persons in the levying of the tax and no inequality in fixing value as to property. This finding of fact was warranted, if not demanded, by the evidence and the verdict and judgment was approved by the Supreme Court of Georgia. (See printed record, page 58.)

"On error to a State court in a chancery case (as also in a case at law), when the facts are found by the court below this court is concluded by such finding."

Egan *vs.* Hart, 165 U. S. 188, citing

Dower *vs.* Richards, 151 U. S. 658, and cases therein referred to.

Bartlett *vs.* Lockwood, 160 U. S. 357.

Stanley *vs.* Schwalby, 162 U. S. 255, 278.

It does not appear from the record in the case that there is a single person in Georgia the owner of shares of stock in a foreign corporation from whom this tax is not demanded and collected, and it does affirmatively appear that the Comptroller-General, who is the head of the taxing department of this State, issued to the local receivers of tax returns instructions that "stock in foreign corporations held by citizens or corporations of this State should be returned for taxation in this State." (See record, page 80.)

THE CLAIM OF EXCESSIVE VALUE FOR TAXATION.

The record discloses that after hearing the evidence submitted the judge, trying the case by consent of counsel without a jury, found that "the evidence submitted does not show that the value of the stock placed thereon by the Comptroller-General is excessive." This property is taxed within the constitutional limitation. "All taxation must be uniform upon the

same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

> Costitution of Georgia, Art. 7, Sec. 7, Par. 1. (Civil Code, §5883.)

The questions, therefore, growing out of the first assignment of error, to wit, the claim of the denial of the equal protection of the laws, as to person and property, in the light of the record, is wholly unsupported. It is but a mere claim of a Federal question without the color of merit, and this court is consequently without jurisdiction.

II.

WANT OF DUE PROCESS.

The second assignment of error, (a) that its property is taken without due process of law for the reason that the Georgia statute under which the Comptroller-General acted afforded no opportunity to appellant to contest with the State the value of its property for taxation, and (b) the further allegation that appellant is not the owner of the stock in controversy, but that the situs of said shares is not within the jurisdiction of the State of Georgia and that a tax by the State of Georgia on such shares is an attempt to tax property the situs of which is outside of the State of Georgia and is an attempt to deprive petitioner of its property without due process of law and to deny to it the equal protection of the laws, tried in the light of this record is equally without merit and raises no Federal question. These are mixed questions of law and fact and must be considered in the light of the record.

NO FEDERAL QUESTION IN THIS ASSIGNMENT.

It is not denied that the appellant knew that it owned this property; that it was subject to taxation; that it had not been returned, and that it could have returned it at what it conceived to be its value, and if rejected and assessed by the Comptroller-General, the law provided machinery for the adjustment of the differences between the taxpayer and the State by a submission to arbitration.

KNOWINGLY AND WILFULLY REFUSED TO MAKE THE RETURN.

This is not a case where the appellant omitted ignorantly to return its property for taxation and an assessment by the Comptroller-General without notice to the appellant. Appellant not only neglected, but refused, to return the property in controversy for taxation, not because the Georgia law did not afford it an opportunity to contest its value, but for the reason urged that it was not subject to taxation under the laws of Georgia, and this, too, after a decision by this very court that the shares of stock *was* property and property subject to taxation under the laws of Georgia.

Wright, Comptroller-General, *et al. vs.* Louisville & Nashville Railroad Co. *et al.*, 195 U. S., p. 219.

The executions in controversy were not issued until after the judgment of this court was rendered in the case of Wright *et al. vs.* Louisville & Nashville R. R. Co. *et al,* supra, and issued then only after a refusal of appellant to return its property for taxation.

VALIDITY OF A TAX IS RESTRICTED TO PROPERTY WITHIN THE TERRITORIAL JURISDICTION OF THE TAXING POWER.

It is conceded, of course, that it is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. In other words, it is not disputed that the operation of State laws are limited to persons and property within the boundaries of the State and that property wholly and exclusively within the jurisdiction of another State would not be liable to the tax. This is true not only as to real property, but as to tangible personal property where it had acquired a permanent situs in a State other than the domicile of the owner of the property

Union Refrigerator Transit Co. *vs.* Kentucky, 199 U. S. 194.

THE RULE AS TO INTANGIBLE PROPERTY DIFFERENT.

This, however, is not the rule as to intangible personal property, for there is an obvious distinction between tangible and intangible property. The situs of tangible property is fixed by the maxim mobilia sequunter personam. The important question for the determination of the court below was as to the ownership of this property. That was a question of fact and it was determined after hearing evidence in the court below that appellant was the owner of this property. In the trial of the case in the courts of Georgia evidence was introduced and the point stressed that appellant was not the owner of the stock. Whether or not it was the owner was a question of fact passed on by the court of Georgia, and it was there found by the court that the stock in controversy was the property of appellant and its situs for taxation was in Georgia. Whether or not the Supreme Court of Georgia

decided that fact right under the evidence is not a Federal question. The question, however, was correctly decided. It was involved in the construction of a contract to which appellant became a party by purchase. It is true appellant set up that it had only an equitable interest in this stock and could not be taxed to its full value, but the Supreme Court of Georgia in construing the contract reached the conclusion that the duty was on appellant to pay the tax since appellant enjoyed the substantial beneficial ownership. Appellant received the dividends, voted the stock and could redeem it at any time. The stock had been hypothecated by appellant's predecessor in title in New York for the purpose of securing a debt. "The value of property consists in its use and he who owns the use forever, though it be on condition subsequent is the true owner of the property for the time being . . . . where taxation is ad valorem values are the ultimate objects of taxation, and they to whom values belong should pay the taxes."

Wells *vs.* Savannah, 87 Ga. 399.

Central Railway *vs.* Wright, 124 Ga. 630.

The creditor of appellant in New York who has the physical possession of the stock does not set up any claim to the ownership, nor does either the appellant or creditor suggest that any tax has ever been paid on this stock to the State of New York. Hidden in the strong box of the creditor at New York, unless this tax now demanded is collected, appellant escapes the duty and burden of contributing its proportionate share to the support of the government, whose protection it has received and now enjoys.

APPELLANT OUGHT NOW TO BE ESTOPPED FROM RAISING THE QUESTION OF DENIAL OF DUE PROCESS OF LAW.

A litigant will not be heard on the claim of denial of due process of law in that he has had no opportunity to be heard on the value of his property for taxation when he refused and neglects to do his duty by returning it for taxation, and when so returned the opportunity is given him by the statute of the State to be heard as to its value. He can not take advantage of his own wrong. By his wilful omission in this case appellant waived the right to a hearing as to the value of his property by refusing to return it for taxation. The burden of returning its property was on appellant, placed upon it by the Constitution and laws of the State, and ample machinery is provided for a hearing as to the value of its property had it been returned for taxation. Appellant's wilful refusal to return it for taxation is a waiver of the right to be heard as to value.

THE SUPREME COURT OF GEORGIA ADJUDGES APPELLANT IN DEFAULT.

The Georgia law as construed by its Supreme Court amply affords notice to the taxpayer and an opportunity to be heard as to value, provided he does his duty by first returning his property for taxation. The court holds further when he refused to return it, he is a defaulter and it becomes the duty of the taxing officer to assess it, which assessment shall be final. In other words, the Supreme Court of Georgia holds

in this case, that appellant should have returned its property for taxation, that it had ample notice of its taxability, and that its omission to return it was wilful, and because of this omission the right to contest with the State the value of the property was waived.

"A person may by his acts, or omission to act, waive rights which he might otherwise have under the Constitution of the United States as well as under a statute, and the question of whether he has or has not lost such right by his failure to act, or by his omission, is not a Federal question."

Leonard *vs.* Vicksburg, etc., Railroad Co., 198 U. S. 416; citing

Eustis *vs.* Bolles, 150 U. S. 361;

Rutland Railroad Co. *vs.* Central Vermont Railroad Co. 159 U. S. 630.

THE LAW OF GEORGIA FURNISHED AN OPPORTUNITY TO BE HEARD.

"Whenever corporations, companies, persons, agencies, or institutions, are required by law to make returns of property or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller-General for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the Comptroller-General, and if in his judgment the property embraced

therein is returned below its value, he shall assess the value within sixty days thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned, as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice, and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators—one chosen by himself, and one chosen by the Comptroller-General—with power to choose an umpire in case of disagreement, and their award shall be final." §812 Code of Georgia of 1895, Vol. 1.

"In cases of failure to make return, the Comptroller-General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions." §813 Code of Georgia 1895, Vol. 1.

"Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest." Political Code §855, Vol. 1.

"The Georgia law affords to every citizen, individual or corporation, ample facilities for the preservation of his rights as against the tax-gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property . . . . . the requirements of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity

to dispute with the State the question of the value of his property and the amount of tax to be levied thereon. . . . In other words, ample machinery is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection."

See Georgia Railroad Co. *vs.* Wright, 124 Ga. 617, citing
Cooley on Taxation, 619 to 624.
Board of Commissioners *vs.* Anderson, 68 Fed. 341.
Lott *vs.* Hubbard, 44 Ala. 593.
McMillan *vs.* Carter, 6 Mont. 215
Orena *vs.* Sherman, 61 Cal. 101.
Pittsburg Railroad Co. *vs.* Backus, 154 U. S. 426.
Hagar *vs.* The Reclamation District, 111 U. S. 701.
DuBignon *vs.* Brunswick, 106 Ga. 217.

APPELLANT REFUSED THE RIGHT TO BE HEARD.

The appellant was in position therefore to avail itself of all the rights and privileges it asserts have been unjustly denied. The door was wide open to the appellant, if it wished to litigate over value by making its return for taxation as was its duty under the law. Appellant should not be heard now to complain that the door is closed. That it is closed is not the fault of the law, but the act of appellant. The Fourteenth Amendment had not for its purpose the encouragement of persons in default, but the protection of person and property of those who were free from fault. A person can not disregard the laws and invoke the Fourteenth Amendment to protect him in a right which he claims has been denied him when the

observance of the law would have accomplished the very thing of which he complains. The Georgia law is plain and as construed by its Supreme Court affords an opportunity to be heard, provided the taxpayer does his duty. If he defaults it is a waiver of his right to be heard, and the Supreme Court of Georgia adjudged appellant in default and as having waived the right to be heard on values. This judgment is of itself sufficiently broad to sustain the judgment independently of the Federal question involved.

If, however, there be a Federal question involved, if the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, or upon some other independent ground sufficient of itself to sustain the judgment, this court will decline to further entertain jurisdiction of the case.

"To give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a Federal question was presented for decision to the State court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it." Where the record discloses that "If a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question not Federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustice *vs.* Boles, 150 U. S. 362.

THE FOURTEENTH AMENDMENT ENGRAFTS NO NEW PRINCIPLE INTO THE CONSTITUTION RELATIVE TO TAXATION.

"Although this court has never had occasion to determine exactly what the Fourteenth Amendment required in the assessment of ordinary annual taxes upon personal property such proceeding should be considered with the utmost liberality, and while notice need not be personal, but may be given by publication or by posting notices in public places. Such notices must be suitable and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared not to be due process of law."

Glidden *vs.* Harrington, 189 U. S. 255.

ARGUMENT.

The case of appellant is without merit and in the light of this record scarcely short of trifling with the law. This stock has been adjudged, both by this court and the Supreme Court of Georgia, as property subject to taxation under the laws of Georgia. The only semblance of merit to be found in this record is the claim of appellant that it acted under a misapprehension in not including this stock with the other property in its annual returns for taxation. Grant that the omission was the result of an honest mistake of law. This, however, can not be urged as a reason for a relinquishment of this property from its liability to taxation. This omission was called to

the attention of appellant by the taxing officers of the State and a request was made for a supplemental return. Even after the Supreme Court of the United States adjudged that this stock was subject to taxation the appellant refused, and up to this hour refuses, to offer to return it for taxation.

The claim of the denial of due process of law in that appellant has had no opportunity to contest with the State the value of the shares of stock in controversy will not in the light of this record appeal to this court. Appellant has never offered to return the shares of stock in controversy for taxation, and while it submitted to the taxing officer certain evidence as to the value of the property appellant has steadily, consistently and at all times studiously avoided returning the property or asking for the opportunity to now return it. Appellant did not wish to hear evidence as to the value of this property and in open court resisted an effort made to introduce evidence with the view of ascertaining the true value of the property. Notwithstanding the neglect to make a voluntary return of this property and appellant's attitude in moving to strike the offer extended at the trial of the case in open court to hear evidence as to value, the courts of Georgia did decide that they would hear evidence and in fact did hear evidence, and did find that the assessment was not excessive and that there had been no discrimination in the levy of the tax. There can, therefore, be no longer any valid reason urged why this tax should not now be collected. It may be inconvenient to appellant to pay the accumulated tax of several years in one lump sum, but it could not be urged as a hardship to require appellant to pay its just taxes.

It is respectfully submitted for these reasons that this writ of error should be dismissed.

JNO. C. HART,
Attorney for Appellee.

No. 89.

FILED.
OCT 11 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1907.

~~No. 324.~~

THE GEORGIA RAILROAD & BANKING COMPANY,
Plaintiff in Error,

vs

WILLIAM A. WRIGHT, Comptroller-General of Georgia,
and JOHN W. NELMS, Sheriff of Fulton County.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF of,

JOS. B. CUMMING,
ALEX. C. KING,
JOSEPH R. LAMAR,
For Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 384.

THE GEORGIA RAILROAD & BANKING COMPANY,
Plaintiff in Error,

vs.

WILLIAM A. WRIGHT, Comptroller-General of Georgia, and JOHN W. NELMS, Sheriff of Fulton County.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

Statement of the Case.

This is a Writ of Error from a judgment of the Supreme Court of Georgia, dated May 24, 1906, affirming a Decree of the Superior Court of Fulton County refusing an Injunction and ordering back assessments on 15,000 shares of Western of Alabama Railway stock against the Georgia Railroad & Banking Co., for the years 1895 to 1902, to proceed.

Transcript of the Record, p. 57, 162.

TRANSACTIONS LEADING UP TO THE BACK TAX ASSESSMENTS.

No citizen of Georgia has ever paid taxes on foreign stock. Record 69, (7). But on May 25th, 1901, the Comptroller General requested the Attorney General of the State to give

an opinion as to whether foreign stock was taxable, and received an opinion that it was subject to ad valorem taxation. Record, p. 137 (37).

The Comptroller, thereupon, threatened to tax the Georgia Railroad & Banking Co. on these 15,000 shares for the year 1901. Thereupon, the Louisville & Nashville Railroad and the Atlantic Coast Line Railway Co., lessees of the Georgia Railroad & Banking Co., filed on August 22nd, 1901, a Bill in the United States Circuit Court for the purpose of testing the taxability of such stock. Record, 106 (210).

The United States Circuit Court—Judge Newman delivering the opinion—held (Record 111-119) that foreign stock was not taxable. This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit. (Record, 121).

This judgment was taken by Writ of Certiorari to the Supreme Court of the United States, In Wright v. Louisville & Nashville R. R., 195, U. S., 219, it held that the Constitution of Georgia of 1877, made foreign stock taxable, and reversed the ruling of the lower court. (Record, 121-124).

The Mandate was dated January 5, 1905. (Record, 124). It was made the judgment of the Circuit Court, January 10, 1905. (Record, 125.)

The Comptroller General immediately gave this ruling a retrospective effect, and, on February 7, 1905, without any process or hearing, (Record, 21 (13), issued 22 separate assessments against the Georgia Railroad & Banking Company for back taxes on 15,000 shares of Western of Alabama Railway stock for the years 1883 to 1904, inclusive. Record, 21 (13), as follows:

FORM OF BACK TAX ASSESSMENT.

Whereas, The Georgia Railroad & Banking Company, a corporation chartered under the laws of Georgia and doing business in this State, having failed and refused to return for taxation for the

year 1895, 15,000 shares of stock of the Western Railway of Alabama corporation, said stock being then held and owned by said The Georgia Railroad and Banking Company in this State; and having failed and refused to pay the taxes then due the State thereon for the year 1895, as required by law, I hereby assess the said 15,000 shares of stock of the Western Railway of Alabama for said year as being then of the value of $900,000. Said assessment being made by virtue of authority vested in me as Comptroller General from the "best information I can procure."

Given under my hand and seal of office, this February 7, 1905.

WILLIAM A. WRIGHT,
Comptroller General of Georgia.

Record, 70 (10).

EXECUTIONS ON THE BACK TAX ASSESSMENTS WERE IN PERSONAM, NOT IN REM.

Thereafter the Comptroller, on February 17, 1905, issued 22 fi fas for back taxes aggregating $125,000 for State taxes alone besides interest at 7% from December 20, of each of the years 1883 to 1904. Record, 26-27, 21 (13).

These Back Tax assessments and fi fa's were not **In Rem,** but were equivalent to judgments **In Personam,** directing as they did, the sheriff of

> "All the goods and chattels, lands, tenements, and franchises of the Georgia Railroad & Banking Company, you cause to be made the tax and interest aforesaid."

Record 71 (13).

LEVY ON WAREHOUSE.

These 22 fi fas were not levied on the stock described in the assessments and executions, but on February 23, 1905,

were levied on the warehouse and freight yards of the Company in Atlanta. Record 72 (149).

PETITION FOR INJUNCTION.

On March 4, 1905 Record 28 (56, 18) the Plaintiff filed in the Superior Court of Fulton County its equitable petition against Wm. A. Wright, Comptroller General, and J. W. Nelms, sheriff, seeking to enjoining 22 fi fas issued on these Back Tax assessments on the following grounds, among others:

(1.) That the beneficial interest of the stock was not in the Georgia Railroad & Banking Co., but in its lessees, who were entitled to vote the stock and receive any dividend that might be declared. Record 19-21; 66 (136).

(2.) That the Georgia Railroad, held a marshal's deed to an undivided one-half interest in the property formerly known as the Western of Alabama Railroad, and as the owner of said real estate in 1881 had leased the property to W. M. Wadley for 99 years; after the lease, a charter had been granted in Alabama, and the Georgia Railroad had conveyed to the new company its interest in the property subject to the 99-year lease previously made to W. M. Wadley; that the 15,000 shares of stock represented the Georgia Railroad's interest in the Alabama corporation, encumbered by this Lease; that the Georgia Railroad had only a reversion in the stock as the Lessees were entitled to all the profits of the Road and dividends on the stock. Record 19 (5)-21 (12).

(3.) That the Georgia Railroad had no taxable interest in the stock except possibly as to the reversion, but that even if it was taxable with its full value, the assessments made by the Comptroller were excessive and enormously beyond the market value of the stock;

(4.) That there was no statute authorizing the Comptroller General to Back Tax;

(5.) That the assessments had issued without Due Process of Law in that there was no right or opportunity to Plaintiff to be heard on the question of Taxability or Value of the stock;

(6.) By an Amendment, it was alleged that the claim for Back Taxes was barred by the Statute of Limitations. Record 33 (16);

(7.) That the Back Taxes assessments were void because issued in violation of the Equal Protection clause of the Constitution of the United States, for that,

During the years 1883 to 1904, such stock was not treated by citizens of tax officers as taxable. Record 29 (2); 30 (4); 30 (5);

(8.) That notwithstanding the general opinion that the stock had not been taxable, and the universal practice of not requiring it to be returned, the Comptroller had "**singled out**" the Georgia Railroad and back-taxed it for 22 years, and that this amounted to a denial of the equal protection of the law, since the Constitution of Georgia prevents classification of property, and requires Uniformity in the levy and collection of taxes. Record 31 (16).

(9.) That there was a further denial of the Equal Protection of the Law in that, while the Comptroller, for the purpose of Equilization, allowed other railroad property a reduction of 33% from what he determined to be the market value of such property, he allowed the Georgia Railroad no such deduction, but had assessed the stock at what he found to be its market value, and what Plaintiff claims was far in excess of its market value. Record 22 (F); 56 (4).

(10.) That since no other citizen had been required to return foreign stock for the years 1883 to 1905, it was now impossible to discover who had owned such property during those years; that no questions having been asked as to how many shares they owned during the years 1883 to 1898, and from 1901 to 1904, and the question, when asked in 1899

and 1900, not having been required to be answered, it would necessarily result that many who owned stock from 1883 to 1905 would escape taxation, and that to single out plaintiff and tax it on such stock because it happened to be known to be the owner thereof, when there had been no general attempt to discover who else owned similar stock during those years, Plaintiff argued would not be the collection of taxes under a uniform law, or a general law, but would be to tax Plaintiff because of the accident that it happened to be known to own such stock, resulting in a denial of the Equal Protection of the Law. Record 29, (1), (3).

That from 1883 to 1899, the form of questions submitted to taxpayers in making their returns did not require an answer as to the number of foreign shares owned. Record, 30 (4, 5.)

That by Act of 1898, pages 36, 30, levying a tax for 1899-1900 there was, for the first time, included an inquiry as to "How many shares of stock did you own issued by corporations located without this State." That this question was treated as inoperative both by taxpayers and taxing officers, and was not answered or required to be answered. That acting on the theory of the non-taxability of such stock, the question requiring return of foreign stock was not re-enacted in the Tax Act of 1900 levying a tax for 1901-2, or for 1903 and 1904, and that for all of the years 1883 to 1902, no such questions had ever been answered or required to be answered by any taxpayer or taxing officer. Record, 30 (4, 5.)

DEFENDANT'S DEMURRER AND PLEA OF RES ADJUDICATA.

On the presentation of the verified Equitable Petition, a Temporary Restraining Order was granted. Record 28, (57). On the Return of the Rule to Show Cause, the Comptroller filed a Demurrer, Plea of Res Adjudicata, and an

Answer. The Demurrer was finally withdrawn. Record 10 (17).

The Defendant plead that the decision of the Supreme Court that foreign stock was taxable (195 U. S., 219) was an adjudication of all questions involved in the present suit.

The Supreme Court of Georgia held that the Supreme Court of the United States in 195 U. S. 219 had only passed on the question of Taxability.

The Plea of Res Adjudicata was not sustained by the Supreme Court of Georgia. Record 163 (340); 169 (354)-172 and will not be further referred to in this Brief

PLEADINGS, AMENDMENTS AND ANSWERS THERETO

Owing to the fact that the pleadings of both parties were amended several times, and to the further fact that they are not set out in regular order, there is some little confusion in the record.

(1.) The original Petition is found on pages 18-27 of the Record;

(2.) The answer to the Petition is found on pages 39-49;

(3.) Plaintiff's first amendment filed April 24, 1905, alleging that the Georgia Railroad had been singled out to be taxed on foreign stock; that to assess it on foreign stock when multitudes of others who owned similar stock have not returned or been required to return, and have not been back-taxed, is a Denial of the Equal Protection of the Law, will be found on pages 29-33;

(4.) **There is no answer to this amendment:**

(5.) As to the taxes for 1903 and 1904, Plaintiff filed an amendment, pages 50-2, reciting that in the return for those years, it had reported its ownership of the stock, but protested that it was not taxable. There was no answer to this

amendment, and as the Supreme Court held that the Injunction had restrained the Georgia Railroad from making its returns for 1903-4, these assessments were prematurely issued, and were, therefore void. This amendment need not be further considered.

(6.) On January 30, 1906, the Plaintiff filed an additional amendment to be found on pages 55-6 of the Record, alleging that the taxation of foreign stock and the exemption of domestic stock was a denial of the Equal Protection of the Law;

(7.) The answer to this amendment is found on pages 53-5.

DENFENDANT'S ANSWER.

In most respects, the answer was equivalent to a confession and avoidance. It admitted that the Georgia Railroad had purchased the property in Alabama at a marshal's sale. That it had received a Deed to an undivided interest therein and operated the property in common with the Central, until in 1881, it leased its interest in the Alabama property to William M. Wadley; thereafter a Charter was obtained for the Western of Alabama Railway, and that, subject to the 99 years lease, the Georgia Railroad had conveyed the property to the newly organized corporation, and received fifteen thousand shares of the Capital stock; that the lessees received all the dividends on the stock and voted it. Record 40-45.

The answer contended that these facts did not prevent the stock from being taxed at its full value, instead of on the reversionary interest.

DEFENDANT'S ANSWER TO THE ALLEGATION THAT THE BACK-TAX ASSESSMENTS HAD ISSUED WITHOUT DUE PROCESS OF LAW.

The answer did not contend that the Georgia Railroad had been afforded the right, by statute, to be heard when the Comptroller made the back-tax assessments, but claimed that the failure to return the stock made plaintiff a Delinquent entitled to no notice.

On this theory, the answer alleged: Record 48-(12).

> "If Petitioner, when it made its returns for each of said years, had included these shares for taxation, as required by the Consitution, and the laws of the State, it would have had the same opportunity for a hearing, and a review of the assessments by the Comptroller, or Board of Arbitration, which it had enjoyed with respect to the items of property which it did actually return to the Comptroller."

> "That, having omitted, and withheld these shares of stock from its returns, it became a delinquent taxpayer as to these years for each and every year in which they were omitted from its returns, and it thereby waived, or lost, its right to any further notice or hearing before the Comptroller, or Board of Arbitration. It then became the duty of the Comptroller, under the statute, as soon as he discovered the default, to assess the same, according to the best information he could procure." Record, 48 (12).

This view that the Plaintiff was a Delinquent, and not entitled to a hearing, was sustained by the Supreme Court of Georgia.

By an amendment Defendants contended that Plaintiff had the right to make a return **nunc pro tunc,** up to the date the assessments were signed, but this view was not sustained by the Supreme Court, which held that when Plaintiff omitted the stock from its Return **it then and there** became

a Defaulter and the door of opportunity was closed so far as any further right to be heard was concerned. Record, 50, 180.

TEMPORARY INJUNCTION REFUSED AND RULING OF SUPREME COURT OF GEORGIA THEREON.

On consideration of the pleadings, documents, and affi davits, the Superior Court Judge, on June 24, 1905, refused the Injunction. Record 28 (54 Bot.).

To this ruling the Georgia Railroad excepted and carried the case to the Supreme Court of Georgia by what is known as a Fast Writ of Error, or an "Interlocutory Bill of Exceptions."

On this Interlocutory Bill of Exceptions the Supreme Court of Georgia held on the subject of Due Process of Law; Record:

> 1. That all considerations of the good faith of the railroad company should be eliminated from the discussion. Record, 177 (372).
>
> 2. That having failed to include in its annual returns this 15,000 shares of stock, the Georgia Railroad thereby became a defaulter: The **door of of opportunity is closed** to him so far as the right to have the mutual rights between himself and the taxing power adjusted by arbitration is concerned. **Deprivation of the right to be further heard is one of the penalties visited upon the defaulter.**

The Supreme Court of the State held, however, that the executions and assessments for Back Taxes from 1883 to 1894 were barred, and directed that they should be enjoined. Record 166 (20).

In all other respects it affirmed the refusal of the Chancellor to grant a temporary injunction. Record 189 (398).

This, however, was not a Final Decree, and could not be brought to this Court by Writ of Error.

The opinion of the Court on that branch of the case, however, ruled on the subject of Due Process of Law, and for the convenience of this court and by consent of parties, the opinion of Judge Candler has been incorporated as a part of the records herein. Record 163-189.

FINAL TRIAL.

After the decision on the Interlocutory Bill of Exceptions affirming the refusal to grant a Temporary Injunction, the Remitter was returned to the Superior Court of Fulton County. The case stood for hearing on the merits and for Final Decree.

The defendants withdrew their demurrer. Record 10(17).

NO JURISDICTION ON TRIAL TO FIX THE VALUE OF THE STOCK FOR THE PURPOSE OF DETERMINING THE AMOUNT FOR WHICH TAX EXECUTIONS SHOULD PROCEED.

The trial on the merits was held January 30, 1906, (Record 57).

Although the Supreme Court in the Injunction case decided that the assessments were conclusive under the Statute, the Defendant in its amendment Record 54 (5), filed January 30, 1906, during the final trial, prayed that the court would find that the stock had been assessed by the Comptroller at its true market value.

Plaintiff moved to strike this part of the amendment on the ground that the Superior Court had no jurisdiction to re-assess or re-value the stock, and that the amendment was vague and indefinite. The Judge of the Superior Court held that in this case

> "He could not decide or fix the value of such stock for the purpose of determining the amount for which executions for taxes should proceed, but that he would hear evidence with a view of determining whether such assessments were excessive."

ADMISSION AND EVIDENCE THAT FOREIGN STOCK WAS NOT TAXED.

There is no answer filed to the amendment alleging that plaintiff was singled out for taxation on Foreign Stock and that citizens were not taxed on such stock.

This Record contains an admission—

> That the Georgia Railroad & Banking Company and the Central of Georgia Railway Company were the only persons owning foreign railroad stocks proceeded against for taxes on these kinds of shares. The statement of the Comptroller that he knew of no other delinquents was also admitted. Record, 69, (7).

In his instructions to Tax Receivers for the year 1903, the Comptroller (Record, 69 (143), (8), stated that he believed he was correct in claiming that "little if any of such foreign stock in this State is returned for taxation, the owners claiming that there is no statute providing specifically for that taxation, and refusing to return it. I have a case now pending in the courts involving this question, in which I am claiming back taxes upon property of this kind, amounting to about $200,000. I refer to the suit of the Comptroller vs. the Georgia Railroad & Banking Co., to recover back taxes on 15,000 shares of the Western of Alabama, held by the Georgia R. R. since 1881. The Central of Georgia is also an owner of an equal amount of such stock, which we hope to subject to back taxes for the same time."

In his Annual Report for 1903, the Comptroller also stated that foreign stock "should be required to be returned for taxation in this State, it being claimed by the owners of such that there is no Statute of Georgia which specifically requires their return for taxation. This item of stock, if taxed, would add several millions of dollars to the taxable values of the State." Record, 69, (144.)

These instructions did not require the County Tax Collectors to take any steps for back-taxing foreign stock, and shows that the Comptroller considered that there were several millions of dollars of such foreign stock held in the State.

This Report and these instructions are for the year 1903, which is a period subsequent to the years involved in the present case, for, in view of the decision that the assessments for "1903 and 1904 were prematurely issued," the final decree of the Supreme Court of Georgia was that the back-tax assessments for **1895 to 1902** should **proceed.**

AFFIDAVIT OF FORTY TAX RECEIVERS.

In addition to the admission on page 69, and these admissions in the instructions and Report of the Comptroller, the Plaintiff introduced the affidavits of 40 Tax Receivers representing 40 different counties. Public utility corporations made their Tax Returns to the Comptroller; Bonds, Manufacturing and Trading Corporations and citizens generally made their Returns for State and County tax to the Receivers. These 40 officers had been in office from one to 15 years, and covering periods from 1895 to 1904. They testified that since they had each been in office,

"The owners of shares of stock of foreign corporations who reside in the State of Georgia have not returned said stock for taxation since Deponent has been in office, nor has Deponent required any such returns from such holders of such stock, and this has been the uniform practice of Deponent since he has been in said office." Record, 67, 68 (4), 68.

It further appeared that the Comptroller himself did not consider that such stock was taxable until 1901, when he asked and received an opinion from the Attorney General. "After investigation, he gave it as his opinion that such stock was subject to ad valorem taxation as other property in this State." Record, 131 (266).

THE USUAL REDUCTION OF 33% ALLOWED OTHER TAXPAYERS NOT ALLOWED THE GEORGIA RAILROAD.

While the Comptroller adopted the Capitalization method in passing on the returns of other corporations, **he uniformly made a reduction therefrom in making the assessment.**

This appears in his letter to Forrest Adair, Prest.,(Record 5-132), where he says:

> "It appears from your report that the net earnings capitalized at 6 per cent would make the property worth $1,000,000 in round figures; making a **reduction of one-third,** would bring the property to a basis at which it is claimed other property in the State is assessed, would make the value $666,667."

Forrest Adair testified that when he went before the Board of Arbitrators, the Comptroller said:

"That he **capitalized the net income and took off one-third** to bring it to the **usual basis** upon which property is taxed in this State."

A. W. Smith, Esq., member of the Board of Arbitration on the Central Railway's return, testified that the Comptroller stated that after arriving at the value of railroad property, and equalizing the railroad values.

"Arbitrarily **deducted one-third** in order to **equalize them with other property for taxation in the State**; he said that was the assessment for all railroad property." R. 100 (198).

COMPTROLLER ADMITTED UNIFORM REDUCTION ALLOWED OTHER RAILROADS.

The Comptroller himself **admitted** that he made a **reduction from the capitalized value,** but stated that he did so for the purpose of arriving at the market value, and not for the purpose of making any reduction.

Whatever the motive, the result was that other railroads were allowed a reduction from the capitalization value, and the Georgia Railroad was allowed no reduction. The Comptroller's evidence on this point being as follows:

"In making reductions, I made them for the purpose of getting at the true market value, and not for the purpose of getting at two-thirds of the market value." Record 138. "As to the letter of Mr. Adair, I capitalized the net earnings on a basis of 6 per cent., and reduced the assessments one-third. I did it on the idea that he wanted to get at the market value and not do these people any injustice. I might have unintentionally created a different impression, but it (reduction) has always been on the idea of reaching the market value. When I reached the market value of railroad property, I have not always made a practice of reducing one-third. I reduce it arbitrarily, not necessarily on a 33 1-3 basis. Most of the railroad assessments have been by Arbitrators who would reduce my assessment as much as 80%, in some instances 40% and 50%. My assessments would, necessarily, be the full market value, and, in a great many instances, it would be beyond the market value. Boards of Arbitrators have reduced my assessments from 75 to 80%. Record, 139. And it is natural to believe that my assessment was largely in excess of the market value. They did not consider a fair market value what I considered it. Record 139. They did not sustain my assessments. I was obliged to make my assessments upon the basis of the full market value of the property.

Q. And they deducted one-third?

A. I think they did. I think that was the custom. Record, 139.

COMPARING THE ASSESSMENTS FOR ALL RAILROADS FOR 1895-1904 BASED ON THE CAPITALIZATION METHOD WITH THE ASSESSMENT OF THE GEORGIA RAILROAD, IT APPEARS THAT ITS STOCK HAS BEEN VALUED AT EXACTLY TWICE AS MUCH AS OTHER RAILROAD PROPERTY.

The Record contains (Record, 84-89) TABLES showing the specific value on the capitalization basis of the nine principal railroads in the State of Georgia, for each of the years 1895 to 1904. It also shows the value on the capitalization method of all the railroads in Georgia during the same years.

Excepting the capitalization value of the G. F. & A. R. R. for the year 1903 (Record 85), it appears that during these ten years, every single road in the State was asssessed at a figure very much below the capitalization basis, some of them being assessed as low as 32%. (Record 87). And none of them as much as 80%.

Average of all the railroads in Georgia for ten years—49.53.

Average of Western Railway of Alabama ten years back tax---- -- ---- ------ ---- ---- ----------100.00

The Comptroller offered a letter of the Attorney General, dated August 25th, 1904—(a date subsequent to the period covered by the back assessments in this case) answering an inquiry whether Arbitrators had the right to fix values at 50% of the market value, because other taxpayers had, in certain instances, returned their property at half its value. The Attorney General gave it as his opinion that "the law required all property to be returned at its fair market value. The remedy is, to equalize taxation, to force the man up who is not bearing his part of the burden, and not drag the citizen down to his level who is willing to bear his, or at least, is unwilling to shirk it by making a false return."

It will be seen, therefore, that the Comptroller himself

sometimes made the reduction, and that where he did not, the Arbitrators had a custom of making a reduction, and no effort was made to stop the practice until 1904. Plaintiff contended that the legality of the back tax assessments and the question as to whether the Plaintiff had been denied the Equal Protection of the Law was to be determined by the Method of Valuation and the basis of assessment from 1895 to 1902, for which years the Back Tax Assessments issued, and not by instructions given by the Attorney General in 1904, which related to the assessment of taxes for a period not involved in the present suit.

METHOD OF VALUATION.

The Comptroller did not assess the market value of the stock, but, although there was no statute on the subject, adopted a mathematical rule under which he took the Gross Earnings of the road for each separate year. From the Gross Earning he deducted (arbitrarily) 66% as Operating Expenses. What was left he declared to be Net Earnings, and this he capitalized at 6%.

This gave him the value of the entire Western of Alabama Railway. But as the bonds were ahead of the stock, he deducted from this capitalized value the amount of the Bonded Indebtedness. The balance he found to be the value of the Capital stock. As one-half of the capital stock belonged to the Georgia Railroad, he divided this sum by two, and the result represented the separate assessments he made for each year against the Georgia R. R. Record 126 (255).

In applying the Capitalization method, the Comptroller ignored the fact that the Georgia Railroad stock was encumbered by a 99-year Lease to Wadley and his assigns, the Louisville & Nashville and the Atlantic Coast Line Railroads.

EXCESSIVE ASSESSMENTS AS A RESULT OF THIS CAPITALIZATION METHOD OF VALUATION.

The Comptroller testified, Record 126 (256) "on this (capitalization) basis of value, the shareholders of the Western of Alabama Railway would receive 6% net upon their shares of stock."

Instead of 6% net, the shareholders only received an average of 2.09% during the 23 years for which the Comptroller made the original assessments.

They received only an average of 3½% during the years 1895 to 1902, for which the assessments are now proceeding.

Calculating the dividends received on the assessed value (and not the face) of the stock the shareholder only received an average of 3.02% during the years 1895 to 1902, for which assessments are proceeding.

The dividends paid were not Net, for if, from the dividends actually received during the years 1895 to 1902 inclusive, the taxes assessed by the Comptroller for the State, County and city taxes be deducted, the result will be as follows:

DIVIDENDS FOR EIGHT YEARS, average	3.02
TAXES ASSESSED	46 + 26 + 1.25 = 1.97
Net to the stockholder	1.05

Record 73 and 74.

The theory of capitalization at 6% was wrong, because wherever the method of Capitalization is adopted as a means of arbitrarily determining the value, 7%, the legal rate of interest, must be used as the divisor instead of 6%. The result is an excessive assessment in the present case of 14%, considering the Georgia Capitalization and excluding the Excessive Assessment of 50%.

At the conclusion of the evidence the Court rendered the ollowing:

FINAL DECREE.

"The above stated case having come on regularly to be eard and counsel having consented that it be heard both on he questions of law and fact by the Court without the ntervention of the jury as per order this day taken; and fter having duly considered all the evidence submitted, I ind as follows on the question of fact:

1. The evidence submitted does not disclose any discrimiation in the assessment and levy of the taxes on this stock n controversy compared with other property of the State.

2. The evidence does not show that the value of the stock laced thereon by the Comptroller General is excessive.

3. I further find generally in favor of the Defendant.

WHEREFORE it is ordered, considered and decreed by he Court that fi fas for taxes in favor of the State against he Georgia Railroad and Banking Company, for the years 895 to 1904, inclusive, proceed.

It is further ordered and decreed that the State recover ts costs against the Petitioners for costs of the officers of Court.

Jan. 30th, 1906.

J. T. PENDLETON,
Judge S. C. A. C."

(Record 57).

After entering the Decree, the Plaintiff, in compliance vith the Georgia practice, made a motion for a new trial, (Record 58), and filed and had approved a Brief of the evidence which was made a part of the Record. (Record 62).

The motion for New Trial was overruled; (Record 62), to which Ruling, and also to Rulings made on the trial, the plaintiff duly excepted—taking the whole case, along with the Brief of Evidence to the Supreme Court of the State. Record 10 16. The Bill of Exceptions made the same assignments of error in the State Supreme Court as are made in this Court.

The Supreme Court decided that the assessments for 1903-4 were void, because they had issued prematurely. (Record, 144 (24-27). With that exception, the Supreme Court, May 24, 1906, decided against the Plaintiff and affirmed that the judgment of the Back Tax assessments should proceed. Record, 162.

The result of this affirmance was to rule against the Petitioner on all of the federal questions raised. The effect of the judgment of affirmance being to hold:

1. That Plaintiff had been afforded Due Process of Law in the assessment of Back Taxes even though the Statute provided for no notice and opportunity to be heard and even though such assessments so issued were conclusive.

2. That there was no denial of the equal protection of the law even though no one else had been assessed on Foreign Stock, even though plaintiff is not allowed the reduction of 33 per cent. allowed all other tax payers, and even though the assessment might be excessive.

Thereupon, on August 1, 1906, the Petitioner sued out a Writ of Error (Record 1), and in connection with the Petition, filed (Record 5) the following:

ASSIGNMENT OF ERRORS.

First. That the Supreme Court of Georgia erred in affirming the judgment of the Court below, to-wit: the Superior Court of Fulton County, Georgia, in which a judg-

ment and decree was entered for the Defendants against the Plaintiff, because said judgment and decree denies to plaintiff the equal protection of the laws and takes its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

Second. That the Supreme Court of Georgia erred in affirming the judgment of the Court below in refusing to grant a new trial to this plaintiff and overruling the motion of this plaintiff for a new trial, because said judgment denies to the plaintiff the equal protection of the laws and takes the property of plaintiff without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

Third. That the Supreme Court of Georgia erred in affiirming the judgment and decree in this case decreeing that the tax executions sought to be enjoined should proceed. The error being that each and every execution in favor of the State against the Georgia Railroad and Banking Company for the years 1895 to 1902, inclusive, should have been perpetually enjoined by said decree as prayed for by the Georgia Railroad and Banking Company; Because said executions issued without due process of law, and take plaintiff's property without due process of law, and deny to it the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States.

Fourth. Because the Supreme Court of Georgia erred in not adjudging that the said Superior Court of Fulton County should have decreed that the said executions were void because based on assessments which had been made without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Fifth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because the assessment of back taxes on property omitted from the return of a prior year is an act judical in its nature, and the tax payer is entitled to due process of law in the assessment of such back taxes, with notice of the

time and place of making such assessment, and the right and opportunity to be heard on the value of said property. Plaintiff alleges that the assessments involved in this case were each made without due process of law, and are void because made in violation of the provision of the Fourteenth Amendment to the Constitution of the United States.

Sixth. Because the Supreme Court of Georgia erred in affirming the said judgment and decree of the Court below, for that said decree was contrary to law, because, on
11 the several dates of said assessments, there was no law or statute of force in the State of Georgia which afforded petitioner due process of law in the assessment of back taxes on property omitted from prior returns; that each of said assessments of taxes against petitioner on Western Railway of Alabama stock are null and void because issued without due process of law, in violation of the Constitution of the United States.

Seventh. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because there is no law or statute of force in the State of Georgia, which, before or after the making of said assessments, or at the time of making said assessments, afforded petitioner process of law or the right or opportunity to be heard as to its liability to said tax, or as to the valuation of the stock, and that the assessments thus made by the Comptroller General seek to deprive petitioner of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States; and the Court erred in affirming the judgment that such executions on said void assessments should proceed.

Eighth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because the law of the State of Georgia, as contained in Sections 812, 813, 814, 847, 855, 874, 879, 949 of Volume I of the Code of Georgia of 1895, and the Acts of 1813, 1861 and 1804, in so far as they purport to authorize the assessment and valuation for taxation of property omit-

ted from returns in prior years, is unconstitutional, null and void, and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States in that the said sections of said code and the Acts of the General Assembly of the State of Georgia fail to afford the taxpayer an opportunity to be heard on the question of the value of property omitted from the tax returns of prior years.

Ninth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because plaintiff alleges it appears from the record in said case that for the years 1895 to 1902,
12 petitioner in good faith made its tax returns for each of said years; that the stock of the Western Railway of Alabama was not omitted from said returns or either of them with intent to conceal petitioner's interest in said stock or to escape taxation thereon, but that said stock was omitted in the honest belief, and in reliance upon the universal practice of the tax payers and taxing officers, that the same was not taxable; that said bona fide returns were duly accepted by the Comptroller General, and for said Comptroller without process of law and without the right or opportunity to petitioner to be heard and to offer evidence as to the value of said stock for each of said years, to issue assessments for each of the years from 1895 to 1902, and to back tax petitioner on said stock without the right to be heard on the question of the valuation thereof is to deprive petitioner of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and the Court erred in not enjoining said executions.

Tenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because there is no law of force which affords petitioner the right or opportunity to be heard on the assessment of back taxes on omitted property; that by the universal practice foreign stock was treated as non-taxable, and that a new construction of the law and a new practice of the taxing department should not be given retroactive effect, but should be prospective only; and that the assess-

ment of taxes on said foreign stock for the years when the same was not treated or regarded as taxable, without affording petitioner the right and opportunity to be heard is unreasonable, arbitrary and unjust and takes from petitioner its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

Eleventh. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because on the evidence in said case,
13 to be found in the approved brief of evidence, made part of the record in this case and here referred to, Plaintiff says that said assessments were issued without process of law, without a hearing, and without the opportunity to petitioner to be heard on the question of value of said stock and without notice of the time and place when said assessments would be made, and the assessments and each of them are void because issued without due process of law, because petitioner was not given a day in Court or an opportunity to be heard as to the value of the Western Railway of Alabama stock, and that said void assessments are sought to be used to deprive petitioner of its property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and the Court erred in not adjudging that the assessments should be cancelled and the executions issued thereon perpetually enjoined.

Twelfth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff in error insists that the pleadings and the admission of the defendants show that the holder of no foreign stock had been taxed in Georgia except petitioner and the Central of Georgia Railway Company, who together own the stock of the Western Railway of Alabama; that the taxation of plaintiff in error on foreign stock for years 1895 to 1902 and the failure to tax the holder of any foreign stock for the same period is harmful discrimination against the petitioner in the administration of the law, and denies to petitioner the equal protection of the law, contrary to the

provisions of the Fourteenth Amendment of the Constitution of the United States.

Thirteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff in error insists that the record shows that all other property in the State is returned by the tax payer at two-thirds of its market value, and that such returns on such two-thirds valuation is habitually, knowingly and intentionally accepted by the taxing officers and that where assessments are made by the Comptroller Gen-
14 eral or State Boards of Arbitration, he and they habitually, knowingly and intentionally assessed such property for taxation at approximately two-thirds of its market value, while the said Comptroller General having assessed petitioner's stock at the full capitalization value, made no reduction to equalize such valuation and assessment with the other property in the State, and that in assessing petitioner's stock without making a reduction allowed on other property the Comptroller General discriminated against petitioner to its injury and that such action on the part of the Comptroller and the assessment consequent thereon denied to the petitioner the equal protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Fourteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because plaintiff insists that the record in said case shows the other property in the State of Georgia is not assessed beyond its market value, while the stock of petitioner in the Western Railway of Alabama was assessed by the Comptroller and taxed to your petitioner at at least seventy-five per cent. above its market value, whereby petitioner was denied the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Fifteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff insists it appears from the record

that other property in the State is habitually, knowingly, and intentionally accepted and assessed by taxing officers of the State at at least one-third below its fair market value, while the shares of petitioner in the Western Railway of Alabama were assessed and taxed by the Comptroller General for each of the years at least seventy-five per cent. above its market value, whereby petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

15 Sixteenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error because plaintiff insists that it appears from the record that the Comptroller General in valueing and assessing railroad property for taxation adopted the method of capitalizing net earnings at six per cent. and of deducting therefrom approximately one-third of the value thus found for the purpose of taxation; also, that while the Comptroller adopted the method of capitalizing the net earnings of the Western Railway of Alabama for each and all of the years at six per cent. for the purpose of determining the value of the Western Railway of Alabama, and deducted the bonded indebtedness for the purposes of finding the value of the stock, yet, after finding the value of the stock by such method the Comptroller General made no reduction of one-third or any other sum from the valuation thus found; but assessed said stock for taxation at said valuation thus found without any deduction whatever; that in so doing, the Comptroller knowingly and intentionally discriminated against petitioner, and, in the administration of the laws denied the petitioner the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

Seventeenth. That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, that the said Supreme Court of Georgia, having decided that the decision of said Supreme Court rendered in the case of Wright, Comptroller General vs. Southwestern Railroad reported in 64th Ga. p. 783, 799, was the law of this State at the time of its rendition and remained the law of this State and was not altered by the

adoption of the Constitution of 1877; and was binding upon said Supreme Court as the unanimous decision of the said Court until reversed by a full bench; and said decision fixing the situs of shares of stock in foreign railroad companies for purposes of taxation as without the State of
16 Georgia upon the ground that the same were but representatives of the physical properties of said corporations located outside of said State; it was not competent for the Legislature of Georgia by a legislative enactment to undertake to fix the situs of the said shares of stock, or to tax the same, and such attempt at taxation was a taxation of property beyond the limits of the State of Georgia and was contrary to the Constitution of the United States and to the Fourteenth Amendment thereof, and was the taking of property without due process of law.

EXTRACTS FROM THE CONSTITUTION AND STATUTES OF GEORGIA REFERRED TO IN THE OPINION AND IN THIS BRIEF.

The Constitution of Georgia prohibits classification, and requires uniformity in taxation, and that taxes shall be collected under General Laws, as follows:

§5883, Par. 1, MUST BE UNIFORM, ETC. All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

In Georgia, property is not listed and assessed in the first instance by the tax officer, as in some states. But the taxpayer is required to answer a list of questions set out in Pol. Code 883, in which he is required to state the amount and value of property "owned by the taxpayer on the first day of April" of the current year. Pol. Code 827. In this list of questions, nothing is said about foreign stock.

The General Assembly bi-ennially passes a Tax Act for the two succeeding years.

Returns for State taxes by banks, manufacturing and trading corporations, as well as by citizens generally, are made to the County Receiver of Tax Returns, who finally enters the Return on the Tax Digest. These Tax Digests are then turned over to the County Tax Collector, and if the amounts due are not paid, executions issue on December 20. Pol. Code, 827, 836.

Returns by railroads, and public utility corporations, whose property is generally located in more than one county, are made to the Comptrolier-General, under the provisions of Pol. Code 812 to 815. These sections are, as follows:

RETURNS TO COMPTROLLER, ASSESSMENTS IN CASE OF DIFFERENCE.

§812. **Returns to Comptroller Must be Itemized.** Whenever corporations, companies, persons, agencies or institutions, are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net or any other kind, or any other return, to the Comptroller-General, for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the Comptroller-General, and if in his judgement the property embraced therein is returned **below its value,** he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned as aforesaid, below the true amount, **or false in any particular, or in anywise contrary to law, he shall** correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators—one chosen by himself, and one chosen by the Comptroller General—with power to choose an umpire in case of disagreement, and their award shall be final.

PROCEEDINGS IN CASE OF NO RETURNS; COLLECTION BY COMPTROLLER.

§813. **When no Return, Comptroller to Assess.** In cases of failure to make return, the Comptroller-General

shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions.

§814. **Collection of Tax, How Enforced.** In all cases of default of payment of taxes upon returns or assessments, the Comptroller-General shall enforce collections in the manner now provided by law.

§815. **Usual Penalties Still of Force.** Nothing in the three preceding sections shall alter or affect the penalties now provided by law against defaulting or delinquent corporations, companies, persons, or institutions referred to therein, or to alter or affect the mode of enforcement of such penalties now provided by law.

§874. **Defaulting Corporation.** If any corporation, company, person, agency, or institution, who are required to make their returns to the Comptroller-General, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the State Treasury, the Comptroller-General shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties.

§879. **When There is no Return.** When there is no return by which to assess the tax, the Comptroller-General shall, from the best information he can procure, assess in his discretion.

The Supreme Court held that, in 1861, for the first time the Comptroller-General was made a tax officer. The only reference in the Act of 1861 to his duties is found on pages 73 and 80, where the Governor was authorized with the assistance of Comptroller to assess on the entire amount of taxable property such an amount as will raise not exceeding $1,000,000. Acts 1861, p. 80 and p. 73. (Sec. 5).

POWER OF COUNTY TAXING OFFICERS TO COLLECT FOR BACK TAXES.

This power is found in Pol. Code, 847. 855 and 949,—cited by the Supreme Court as follows:

§847. **Defaulters to be Doubly Taxed.** If a person fails to make a return, in whole or in part, or fails to affix a value to his property, it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain, and having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made.

§855. **Taxes for former years, how returned and collected.** Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the laws in force at the time the default, occurred, and shall be so specified in the digest.

§949. **Collector's Duties Enumerated.**

(2.) To search out and ascertain as far as possible all polls and professions, and all taxable property not returned to the receiver or not found in his digests.

(11.) To issue executions against all tax defaulters who are residents of the counties in which said tax collectors are holding their offices, for any and every year preceding and including the years for which they are elected, and to collect the tax due from said defaulters, and pay over the same to the proper authorites.

THE ACT OF 1804.

The Act of 1804 was the groundwork of the Georgia system for the collection of taxes. It makes no provision for the assessment of back taxes in any such manner as that adopted by the Comptroller-General. It provided for **Suits** to be brought within twelve months after the default,—but nothing in the nature of an assessment without a hearing.

"If any person shall neglect, or refuse, to give in return of his taxable property, or shall be convicted of fraud, or of making false return, he shall be liable to pay a fine of ten dollars for every hundred dollars valuation so neglected, or concealed, one-half for the use of the county, and the other half for the use of the informer, **to be recovered in any court** having cognizance of the same." Act of 1804, Sec. 8, Cobb's Digest of Laws of Georgia, 1047.

"Every person refusing or neglecting to give in a list of his taxable property shall forfeit and pay for every such neglect * * * (a penalty) * * * to be **recovered by Bill, Plaint or Information before any Court of Record,** the one-half thereof to go to the informer, and the other half to the use of the county, except where the prosecution is carried on by presentment, and, in that case, the whole shall be applied to the use of the county, provided always that such information, or presentment, **be made within twelve months after such neglect, or default.**" Act of 1804, Sec. 18, 1050, Cobb's Digest, 1050.

ACT OF 1813 NOW POL. CODE 855.

"The receivers of returns of taxable property, and collectors of taxes, are authorized and required to **receive the returns** of taxable property, and to collect the taxes **thereof** for all former years since 1800, inclusive, where any county is in default for not having made their returns as required by law, provided that the taxes shall be assessed in conformity to the laws in force at the time such default happened." Act of 1813, Cobb's Digest, page 1060—now codified as 855 of the Pol. Code.

ACTS OF 1885 AND 1898, AS TO FOREIGN STOCK.

BE IT FURTHER ENACTED that personal property shall be construed for purposes of taxation to include * *

All stocks and securities, whether in corporations within this State, or any other states owned by citizens of this State, unless exempt by laws of the United States or of this State. Acts 1885, p. 30, Sec. 2.

The questions propounded to the taxpayer in Pol. Code 833, and which he signed in making his return, did not inquire as to the number of shares of stock in a foreign corporation, nor were such questions propounded by any Biennial or other tax act until the Act of 1898, p. 36 (30) when this question was included:

"How many shares of stock did you own on the date fixed for the return of property for taxation issued by corporations without this State?"

31. What was the gross nominal value thereof?

32. What was a fair market value thereof?

These questions were not included in the Biennial Tax Act of 1900, nor in that of 1902.

BRIEF FOR PLAINTIFF IN ERROR.

No citizen of Georgia has ever paid tax on foreign stock. The Plaintiff failed to include its stock in its annual Tax Returns because of the general understanding that the same was not taxable, and of the universal practice, by the Taxing Department, not to require the same to be returned. When it was finally decided that this practice was incorrect because based upon an improper construction of the Constitution, the Comptroller issued back-tax assessments without a hearing.

In answer to the Plaintiff's contention that such assessments issued without a hearing were void, the Supreme Court of Georgia held:

1. That the assessments were made conclusive by the Statute. (Record 153 bot.) Pol. Code 813.

2. That "Plaintiff's good faith should be eliminated from the discussion." (Record 177.)

3. That when the stock was omitted, even in good faith, the Plaintiff "**then** and **there** became a defaulter." (Record 180.)

4. That "the door of opportunity" was closed. (Record 180.)

5. That no "machinery" was afforded the Plaintiff for correcting its error, (Record 165 (11))—even though that error may have been caused by reliance upon a universal understanding, and general practice of citizens and tax officers.

6. That the Plaintiff was entitled to no notice, or hearing. (Record 165 (11))

7. That the deprivation of the right to be heard was a penalty. (Record 180.)

Plaintiff contends (Assignments 1 to 11, Record 5-7),

that back-tax assessments, made in pursuance of such a statutory system, are void, because

ISSUED WITHOUT DUE PROCESS OF LAW.

I.

The right to be heard is indefeasible, and plaintiff could not be deprived of this right, under the form of a penalty.

Hovey vs. Elliott, 167 U. S., 414.

Cooley's Con. Limitation, (7th. ed.) 518; Galpin vs. Page, 18th, Wall. 368, (Bot.)

Particularly where, as under the laws of Georgia, (Pol. Code, 883), the judgment is **in personam** binding all the property and franchises of the Plaintiff.

II.

The Plaintiff cannot be confronted first and last with a conclusive assessment, but the law must **provide a mode of contesting the charge imposed,** whether it be the original assessment, a reassessment, or by way of addition of omitted property.

Gray on Limitation of Taxing Power, Sec. 1295, (p. 639); Palmer vs. McMahon, 133 U. S., 669; Bellingham vs. New Whatcom, 172 U. S., 318 (top); Hager vs. Reclamation District, 111 U. S., 709, 710.

III.

The right to be heard applies to changes in assessments by adding omitted property.

Gray on Limitation of Taxing, P. Sec. 1295, p. 639.

Bellingham vs. New Whatcom, 172 U. S., 318 (top); Tolman vs. Solomon, 191 Ill., 204; Kuntz vs. Sumption, 117 Ind., 1; Walsh vs. State, 142 Ind., 557; Cleghorn vs. Postlewait, 43 Ill., 431.

IV.

The assessment of back-taxes on omitted property involves the determination of value, is judical in its nature, and notice and a statutory right to be heard in back-tax assessments are essential to the due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Winona case, 159 U. S., 52; Weyerhauser vs. Minnesota, 176 U. S., 550; Gallop vs. Schmidt, 183 U. S., 205; Bristol vs. Washington county, 177 U. S., 146 (mid.); Gray on Limitation of Taxing Power, Sec. 1295, (p. 639); Myers vs. Shields, 61 Fed. Rep., 713; Redwood case, 42 N. W. Rep., 475, (affiirmed 159 U. S., 526); Overing vs. Foote, 65 N. C., 269, 277; Adams vs. Tonello, 22 L. R. A., 350 (last column); Myers vs. Street Commission of Boston, 134 Mass., 432; Gibbons vs. Adamson, 24 Pac. Rep., 51, 2 column (Bot.); D'Antignaç vs. City Council of Augusta, 31 Ga., 715.

V.

The general statutory notice, requiring each citizen to return what he owned on April 1, of the current year. (Pol. Code, 827) may afford Due Process for the assessment of taxes for the current year, but a special assessment, made years thereafter, must be supported by a special notice, with a right to be heard, on the charge then imposed, or sought to be enforced.

Authorities cited above. This right to a new hearing is in accord with all the analogies of the law, for, after final judgment, whether by a Court, or a Tax Assessor, on the adjournment of the term, the process is "A SPENT FORCE," the party is discharged from attendance, the question is no longer sub judicie, and jurisdiction is lost.

Phillips vs. Negley, 117 U. S., 678, (Bot.); Brooks vs. R. R., 102 U. S., 107; Griswold vs. School Dist., 24 Mich. 262.

VI.

There must be a period, when, for obvious reasons of policy, the Assessment Roll for any given year must be regarded as completed.

Overing vs. Foote, 65 N. Y., 276; Suddurth vs. Britton, 76 N. C., 461.

Its tax return having been made and accepted, the plaintiff was authorized to depart thence "without a day," with the assurance of the law that no change could be made years afterwards without a new hearing. For the constitutional provision for Due Process cannot be circumvented by giving notice in the first instance, and then adding property and assessing a tax thereon without a new hearing.

Hovey vs. Elliott, 167 U. S. 415; Phillips vs. Township of New Buffalo, 31 N. W. R., 582; Griswold vs. Union Dist. School, 24 Mich. 262.

VII.

The statute provided for no notice, and deprived the plaintiff of a right to be heard as a penalty. This being true, neither a letter nor any other form of notice could be process. For, that must not be of favor or by accident, but the statute itself must provide for notice, and fix the time and place where the hearing can be had under the imperative obligation of the sense of judicial responsibility by an impartial and right decision.

Kentucky Tax Case, 115 U. S., 344; Winona vs. Minnesota, 159 U. S., 538; Spenser vs. Merchant, 125 U. S., 356; Palmer vs. McMahon, 133 U. S., 669; Gliddon vs. Harrington, 189 U. S., 258; Stuart vs. Palmer, 74 N. Y., 183, 188.

VIII.

There are cases in which it was held that a party was afforded Due Process if he was given the right to contest

the charge after the assessment was made. The court held that the assessment in this case was **conclusive** under the statute; that plaintiff was **not entitled** to be heard, either before or after it issued; nor did he have the right to be heard **in the pending cause.**. There was, therefore, an absolute denial of the right to be heard as to the justice of validity of the tax, the taxability or value of the stock, and every other matter affecting the legality of the assessment. On the authority of the cases above cited, the assessments were void.

Gray Limitation of Tax Power, Sec. 1295 (p. 639); Hager vs. Reclamation Dist., 111 U. S., 709, 710.

IX.

The statutory scheme did not afford Due Process of Law in the assessment of back-taxes.

Hovey vs. Elliott, 167 U. S., 414; Hager vs. Reclamation District, 111 U. S., 709, 710; Gray's Limitation of Taxing Power, Sec. 1295, p. 639.

Nor, did the Court, in the pending case, have jurisdiction to afford the Plaintiff a hearing as to the value of the stock, holding as it did that it could not hear evidence for the purpose of determining at what sum the stock should have been assessed for taxation. Record 11 (6).

And the contention of Defendant that the hearing was useless, (Record 48 (99) is no reply to Plaintiff's demand for the constitutional right of a hearing, since, whether "The individual has a defense, or, by way of exemption, or is without defense, is not important. To assume that he has none, and, therefore, is entitled to no day in court, is to assume against him the very point he may wish to contest."

Reese vs. City of Watertown, 19 Wallace, 1, 2, 3; 1 Cooley on Taxation, 3rd Ed., 632.

X.

Since the decision was rendered, this Court has affirmatively declared that in the **assessment of back-taxes** the citizen must be afforded an opportunity to be heard, either when the assessment issued, or in the equity cause brought for cancellation thereof.

Security Trust & Safety Vault Co. vs. Lexington, 203 U. S., 323.

CONTEMPORANEOUS CONSTRUCTION.

Assignment 10, Record 7;

XI.

The plaintiff was entitled to a right to be heard as matter of justice in a case like the present where the stock was omitted in good faith in reliance on the universal practice, and the long-continued and contemporaneous construction that Foreign Stock was not taxable.

XII.

The universal understanding of citizens and Tax Officers that Foreign Stock was not taxable was equivalent to a "Judicial determination," and will be applied in analogy to the principle of res adjudicata.

Bruce vs. Schuyler, 4 Gilman, 221; Cook County vs. Healy, 78 N. E. Rep., 625; Herndon vs. Moore, 18 S. C.; Taylor vs. Ypsilanti, 105 U. S., 60 (2).

XIII.

The decision in the test case of Wright vs. Louisville & Nashville R. R., 195 U. S., 219, reversing the former universal practice and contemporaneous construction, will be given a prospective, and not a retrospective, effect. The

courts will not allow it "to have a greater effect than a simple repeal."

> Herndon vs. Moore, 18 S. C.,_____; Taylor vs. Ypsilanti, 105 U. S., 60 (2); Sutherland on Statutory Construction 307-312.

The doctrine of contemporaneous construction has been applied in tax cases.

> Franklin County vs. Louisville & Nashville, 25 A. & E. R. R. Cases, 535; Rattleman vs. Phipps, 4 Ohio Dec., 453; Mayor of Macon vs. Jones, 67 Ga., 489; Staten vs. S. F. & W. Ry. Co., 111 Ga., 803 (3).

SITUS OF STOCK NOT IN GEORGIA.

Assignment 17, Record 7; Evidence, Record, 19 (5), 21 (12), 66 (136);

XIV.

The Supreme Court decided, in 1879, in Wright vs. The Southwestern, 64 Ga., 799, that Foreign Stock had no situs in this State. In the present case, it decided that the stock was not taxable by the Constitution of 1877. If the Foreign Stock had no situs in Georgia, it was beyond the jurisdiction of the Legislature to give it such situs. The Res was not here. The stock, having been held to be located in Alabama, the Legislature could no more tax it than it could real estate in Alabama.

> Mercantile Bank vs. New York, 121 U. S., 162 (Bot.); Delaware, L. & E. R. R. vs. Pennsylvania, 198 U. S., 341; Union Transit Co. vs. Kentucky, 199 U. S., 194; Louisville Ferry Co. vs. Kentucky, 188 U. S., 385.

XV.

But, even if the Legislature could give it a situs, notwithstanding the decision of the Supreme Court that it had

no situs in this State, it could only tax the interest which the Georgia Railroad had in the stock. The Georgia Railroad had no right to vote it or to collect dividends, but its only interest was a **Reversion,** after the termination of the 99 year lease to Wadley.

XVI.

The taxation of the Georgia Railroad on the full value of the stock, when it only owned a **Reversion,** was not only without Due Process of Law because the interest taxed was not here, but it was also a **Denial** of the **Equal Protection** of the law, since it resulted in plaintiff being taxed on an excessive value.

DISCRIMINATION AND DENIAL OF EQUAL PROTECTION.

Assignments 12 to 16, Record 8, 9; Evidence, Record, 100 to 106; 139.

XVII.

The Fourteenth Amendment prohibits Discrimination by way of taxation, and it is not only a Discrimination against plaintiff but it is Undue and Unreasonable Process to tax plaintiff because of the accidental knowledge that it owned the stock, when the general law made no provision requiring all such stock to be returned. Taxes in Georgia must be collected under general laws, and to require no return, and to allow one citizen to be taxed because it happens to be known to own such stock, is, in principle, the same as to pass a special Act to tax plaintiff, and to leave the law silent as to the multitude who own similar stock during the same years, but whose names are not known, and who, on account of ignorance of the officers, removal from the State, and death, can never be known and never be taxed.

XVIII.

The Fourteenth Amendment prohibits any Discrimination in the collection of taxes, whether that be by an unfair law, or by an unfair administration of a law fair on its face.

An administrative denial of equal protection of the law in collecting taxes is necessarily a question of fact, and the remedy is ultimately in this Court upon Writ of Error. Being so, the evidence can be reviewed by this Court.

> Neal vs. Delaware, 103 U. S., 370; Cortes vs. Texas, 177 U. S., 447; Cummings vs. Bank, 101 U. S., 161; Smyth vs. Ames, 169 U. S., —; Yick Wo vs. Hopkins, 118 U. S., 373; Coulter vs. L. & N. R. R., 190 U. S., 610.

XIX.

There is no conflict in the evidence, but "salient circumstances, about which there is no uncertainty or dispute."

Illinois Central vs. Interstate Commerce Commission, Advance Sheets, S. C. U. S., July 1, 1907, p. 704, 2 Col. (Bot.)

The uncontradicted testimony, as well as the admissions, show that the Discrimination alleged existed:

1. In taxing the holders of Western of Alabama stock when no one else was taxed.

2. In allowing all other taxpayers a reduction of 33⅓ per cent, while no reduction whatever was allowed plaintiff in the assessment of Foreign Stock. Record 100-106, 139.

3. In imposing, by conclusive assessment, an excessive value on the stock. This was accomplished:

(a). By capitalizing at six per cent, instead of 7 per cent, which was the legal rate of interest, contrary to the rule for capitalizing in Georgia. Florida Central vs. Burney, 98 Ga., 5 (Bot.) Record 126.

(b). In ignoring the effect of taxability on the market value. The Comptroller saying that, at the assessed value, shareholder would have received six per cent net, whereas it only received an average of 3½ per cent, and if taxes had been deducted, it would only have received a little more than one per cent. Record 126.

Not necessary to prove fraud, but proof of intentional undervaluation of other property as compared with plaintiff's entitled it to relief.

Louisville & Nashville vs. Taylor, 88 Fed., 371;
Railroad and Telegraph Companies vs. Board of Equalizers, 85 Fed., 305.

Argument.

During the 130 years that Georgia has been a State no citizen has ever paid tax on foreign stock. Only two citizens have ever "been proceeded against for taxes on this class of property." They were singled out, not merely for the current year 1905, but were back taxed for the years 1881 to 1904, inclusive. This was done under the following section of the Code:

Sec. 813. **When no Return, Comptroller to Assess.** In cases of failure to make return, the Comproller-General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies or institutions.

PLAINTIFF'S GOOD FAITH ELIMINATED.

This section does not provide for notice, or fix any time and place for hearing in the assessment of these back-taxes for former years. The assessments in the case were made without pleadings or process, although returns had been made and accepted and the Comptroller General knew that foreign stock had never been returned by any citizen of the State during the years 1895 to 1902.

In answer to the plaintiff's contention that it had acted in good faith, and omitted the stock in reliance on universal understanding that foreign stock was not taxable, the Supreme Court of Georgia held:

"All considerations of the good faith of the railroad company should be eliminated from the discussion. It may be conceded that the officials of the company honestly believed that this stock was not taxable, and that there has never been on their part the slightest effort to conceal the Georgia Railroad's ownership of it, or to deceive the Comptroller General in any way. The railroad company was bound to know that this stock was taxable, and its mistaken, though honest, belief to the contrary, furnishes no excuse for non-payment." Record, 177 (bot.)

PLAINTIFF HELD TO BE ENTITLED TO NO NOTICE OR HEARING AS A PENALTY.

"When the taxpayer fails to return in whole, or in part; fraudulently, or through honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him, so far as the right to have mutual rights between himself and the taxing power adjusted by arbitration is concerned. In other words, ample 'machinery' is available, to the citizens who makes full returns; deprivation of the right to be further heard, **is one of the penalties visited upon the defaulter.** The Georgia scheme of taxation requires the citizen to know what property owned by him is subject to taxation, and contemplates that he will disclose it fully to the taxing officer. Record, 180.

"Every opportunity in the way of notice, protest, hearing, and arbitration is afforded him to correct any mistake of that officer and to obtain exact and even justice. To the defaulter no 'machinery' is furnished for the correction of his own error; he is entitled to no notice, hearing or arbitration; but the officer is required, from the best information obtainable, to ascertain the value of the property, and assess it accordingly. This scheme of taxation is not unconstitutional." Record, 165 (11).

ASSIGNMENT OF ERROR NUMBERED 1-11.

THE BACK-TAX ASSESSMENTS ISSUED WITHOUT DUE PROCESS OF LAW.

The question of due process of law was dealt with by the Supreme Court of Georgia only in the decision of the Interlocutory Bill of Exceptions (Record, 180, 165 (11). That opinion greatly simplifies the issue, because there is now no question as to the character of the notice required or the notice given, since the court holds not only that the statutes do not provide for notice, but that the closing of the "door of opportunity" was intentional (Record 180) and,

THE DEPRIVATION OF THE RIGHT TO BE HEARD WAS A PENALTY.

Plaintiff contends that when the Fourteenth Amendment provided that no person shall be deprived of his property without a hearing, it also declared that he should not be deprived of a hearing as a penalty. The statute cannot reason in a circle, and provide that "every one except a defaulter shall be entitled to a hearing. Plaintiff is a defaulter and therefore not entitled to a hearing." If the penalty for being a defaulter is, that the defaulter, though acting in good faith, shall be deprived of the right to be heard, there must be a preliminary proceeding—something in the nature of "office found,"—some hearing, to establish a default or delinquency, fraught with such perilous consequence for "**liability and right are inseparable.**" (Hovey vs. Elliott, 167 U. S., 414, 409.) Whatever the crime, however great the contempt, howsoever contumacious a party, he cannot be deprived of the right to be heard when his property is to be taken. Judgment of any sort must be after notice, and if the criminal wrong-doer cannot be punished without a hearing, by so much the greater reason an honest and mistaken citizen cannot be declared a defaulter, and deprived of the right to be heard as a penalty. It is contrary to the first principles of the social compact to deprive one of the right to be heard. Hovey vs. Elliott, 167, U. S., 414 passim.

"A party, by his misconduct, cannot forfeit a right so that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form." Cooley Con. Lim. Fed., 518.

THE RIGHT TO BE HEARD EXTENDS TO THE ASSESSMENT OF TAXES

For, under the Fourteenth Amendment, the Legislature is bound to provide a method for the assessment and collection of taxes that shall be "in conformity with natural justice."

Turpin vs. Lemon, 187 U. S., 51.

"Nothing is more clearly established by weight of authority, absolutely overwhelming, than that notice and oppor-

tunity to be heard are indispensable to the validity of the proceedings."

Justice Fields on in R. R. Tax Case, 13 Fed. Rep. 752; see also page 750.

1 Cooley on Taxation (3 Ed.) 626.

In the levy of specific taxes of so much on so much, and the issuance of licenses, or imposition of poll taxes, there is nothing which could be done if a hearing was granted, hence no notice is required in the special class of cases.

"But when a tax is levied on property not specific, but according to values to be ascertained by assessors, upon such evidence as they may entertain, a different principle comes in. They then act judicially. In such cases a notice and an opportunity to be heard, at some stage of the proceedings, must be granted before the particular judgment becomes final."

Hager vs. Reclamation Dist. 111 U. S. 709-710.

A notice is specially necessary where the assessment is equivalent to a jndgment in personam and binds not merely the particular property assessed for taxation, but all the estate of the taxpayer. In Georgia, tax fi fas bind all the property of the defendant, and on them even a garnishmeut may issue. Pol. Code, 880-883.

Plaintiff denied that the statutory process issued in 1895 was like perpetual motion or like gravity,—a continuing force.

The authorities all sustain the proposition that the Statute must provide an opportunity to be heard on the charge, whether that charge be an assessment for the current year or a re-assessment for previous years. As long as the State can change the assessment, the citizen has a right to be heard on the question as to whether the change shall be made, and as to the amount of the new assessment.

For the Statute must "provide a mode of contesting the charge."

Davidson vs. N. O., 96 U. S., 105 (top).

"At a time and place fixed for public sessions of the officers, when the party interested has a right to be present and to be heard and judicially contest the validity of the proceedings."

Glidden vs. Harrington, 189 U. S., 259.

If the charge is for taxes for the current year, there must be notice. If the charge is for back taxes, there must also be notice, and a right to be heard on the back-tax charge.

"Whenever a re-assessment of any kind is made, notice of that re-assessment is essential."

Bellingham Co. vs. New Whatcon, 172 U. S., 318 (top).

RIGHT TO BE HEARD APPLIES TO CHANGES IN ASSESSMENTS BY ADDING OMITTED PROPERTY.

There are only a few cases directly in point, for the reason that usually back taxes are either collected by suit, in which the party has an opportunity to be heard; or else the statute itself provides for notice and an opportunity to contest the back tax charge before it becomes final. As far as we have been able to find, there is no exception to the rule requiring notice.

In every case **where the question has been raised and the taxpayer has planted himself upon the right to the hearing,** granted in the Due Process Clause of the Constitution, the courts have recognized and sustained such right to a hearing in assessment of back taxes.

The text books, the State decisions, and, as we shall attempt to show the Federal decisions, sustain the following propositions:

The Assessment of Back Taxes on Omitted Property Involves the Determination of Value; Is Judicial in its Nature, and Notice and a Statutory Right to be Heard in Back Tax Assessments are Essential to the Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The text books recognize this principle:

"Whenever a re-assessment of any kind is made, whether to validate a void assessment, or to **reach omitted property**, or to secure a re-valuation of the property, undervalued or overvalued, there is the same necessity for notice and hearing as in the case of an original assessment."

Gray on Limitations of Taxing Power, Sec. 1295, p. 639.

"In **adding omitted property** to the tax duplicate, a notice and hearing must be given to the owner,"

27 Am. & Eng. Enc., 705.

The proposition is exactly and forcibly expressed in Myers vs. Shields, 61 Fed. Rep., 713, where, in construing the Ohio Back-Tax Act, it was held that:

"A proceeding by which an assessment for **taxes of years preceding the current year** is entered on the general tax duplicate, without notice or opportunity to be heard; which assessment is a cloud on the title of his realty, and a lien on his property, enforceable by a distraint in sale, without suit in court; deprives him of his property, without due process of law, and is violative of the Fourteenth Amendment of the Constitution of the United States."

The Redwood case, 42 N. W. Rep., 475 (affirmed 159 U. S., 526) passed on the validity of Back Taxes on Omitted Property in Minnesota. The assessments were sustained by the State and Federal courts because it was shown that the statute provided for notice by publication, and gave full opportunity to be heard. But the State court distinctly recognized that notice was essential in back taxes assessments:

"Where, as in the present case, the tax is levied on property, not specific, but according to its value, to be ascertained by some person appointed for that purpose, undoubtedly the party is entitled to notice, and an opportunity to be heard."

In New York, the right to a hearing as to back taxes is recognized as existing, independent of any Statute.

"In respect to the assessment in 1865 of the alleged **omitted taxes** of 1864 against Plaintiff, I am unable to say how its legality can, for a moment, be maintained * * * I find nothing in the Act of 1865 which requires any special notice to be given of the re-assessment of omitted taxes for the previous year, or any special provision for the hearing of any party aggrieved * * * but I cannot suppose it was intended that this might be done without some form of notice, and as none is provided for in the Act, the same reference was intended to the general law relating to that subject.

"Under New York Laws, 1865, providing for the re-assessment of omitted taxes of a former year, this must be done before the roll is completed and notice must be given."

Overing vs. Foote, 65, N. Y. 269-277.

See Douglas vs. Westchester Co., 172 N. Y., 309.

"There must be nothing in the nature of a re-assessment without notice to the party affected * * * * * That rule is founded on the plainest principles of justice, and is enforced by the guarantees of the Constitution."

Tollman vs. Solomon, 191 Ill., 204.

The Supreme Court of Mississippi, in discussing the Back Tax Act and holding it void, says:

"When we consider the duty and power of the agent to collect taxes on property which has escaped taxation, the provisions of the law, are found yet **more objectionable.** As to such property, the agent, without notice to the taxpayer, and without giving him an opportunity to be heard, determines that certain property, at a certain valuation, could be assessed against a particular owner."

Adams vs. Tonella, 22 L. R. A. 350 (last Col.)

The necessity of notice in the assessment for back taxes

was recognized in D'Antignac vs. City Council of Augusta, 31 Ga. 715, where, in reference to the effect of a failure to give notice in the collection of back taxes for ten years, Judge Jenkins says:

"Shall it be said that after ten years of non-action, the defendant in error may cause a demand for taxes to be made, then the taxpayer is a defaulter, then the return of execution **ex parte** against him whereby his property may be sold, and his title thereto divested, **without a hearing,**—a day in Court allowed him. We think not."

A back tax assessment is either a new judgment or an amendment to an old judgment. In either event, notice is necessary, according to all of the analogies of the law; for,

After Final Judgment, Whether by a Court or Tax Assessor, on the Adjournment of the Term, the Party is Discharged; the Question is no Longer Sub Judice, Jurisdiction is Lost, the Original Progress is a Spent Force, and a New Process and Opportunity to be Heard is Needed to Support an Amended or a New Judgment.

This principle is universally recognized.

"After the term at which judgment was rendered, the power of the court over the parties and over its record is gone, except to purge clerical errors."

Philips vs. Negly, 117 U. S., 678 (bot.)

"At the end of the term the parties are discharged from further attendance on all causes decided, and we have no power to bring them back."

Brooks vs. R. R. Co., 102 U. S., 107.

During the term the judgment is **in fieri,** and may be subject to change without notice.

But even where there is a judgment by default, the court cannot, on motion, vacate the judgment at a subsequent term, allow an amendment increasing the **ad damum**, and enter a new judgment for a larger sum.

Radcliffe vs. Barton, 154 Mass., 157.

The same principle was recognized in Pennsylvania in a decision peculiarly applicable to the facts here. The court said that the property having been omitted, not by accident or fraud, but under a construction of the law, the remedy of the State was by submission to arbitration, and not by a second assessment.

In re Monepenny's estate, 37 Atl. Rep., 589.

THE ORIGINAL NOTICE A SPENT FORCE.

In the fine phrase of Judge Cooley, eminent as a judge, pre-eminent on questions on taxation, the original notice is "a spent force." It had accomplished its work in bringing the taxpayer into the tax court, for the current year of 1895. When the return was accepted, the tax entered on the Digest, the books closed for the term, the taxpayer was authorized to "depart thence without a day."

"He was no longer under obligations to watch the proceedings. The public notice which he had, under the law, to appear if he desired to do so had then, so far as he was concerned, **spent its force**, and there was no more occasion for his remaining in attendance upon the board afterwards, lest the action taken be rescinded, than there is for a suitor who has obtained a judgment remaining constantly with the court as long as it remains in session, lest, at some time the judgment should be vacated in his absence and without his knowledge."

Judge Cooley in Griswold vs. Union Dist. School, 24 Mich., 262.

"Where statement of property subject to taxation has been made out and verified by oath of the party, returned to the proper officer and by him accepted as such, and the

amount therein stated is entered upon the duplicate for taxation, it cannot be that the legislature intended to put it in the power of the auditor to increase this amount without notice to the party interested."

Champagne vs. Smith, 7 Ohio State, 49.

The Constitutional Guarantee of Due Process Cannot be Circumvented by Giving Notice in the First Instance and Then Changing the Assessment by Adding Property Without Notice.

Chief Justice Campbell in Phillips vs. Township of New Buffalo, 31 N. W. R., 582 (a tax case), said:

"The right to be heard on the valuation would be nugatory if the board, after giving a party the redress he is entitled to, and leaving him satisfied with their conclusion, **then turn round and undo their judgment.**"

SUPREME COURT OF UNITED STATES HOLDS THAT NOTICE IS NECESSARY IN ASSESSING BACK TAXES.

This Court has recognized repeatedly the necessity for notice and opportunity to be heard in the assessment of back taxes. The Winona case, 159, U. S. 52; the Weyerhauser case, 176 U. S., 550; the Gallup case, 183 U. S. 205 recognized, in the strongest way, the necessity for allowing the taxpayer to be heard when he is back-taxed on omitted property. The defendant claims that these three cases construed statutes which allowed notice as a matter of grace. He contends that they do not hold that the taxpayer was entitled to a hearing as a matter of right. On the contrary, the Federal question involved was whether the Statute afforded due process of law. If the taxpayer had not been entitled to notice under the Fourteenth Amendment, the cases would have been dismissed, for want of a Federal question giving jurisdiction. But assuming as a predicate that the tax-

payer was entitled to a right and opportunity to be heard in the assessments of back taxes, this Court carefully considered the details of the State statutes, showing that in each instance, the taxpayer had been given notice by publication and afforded an opportunity to be heard by the Statute.

"A State statute which provides for the subjection of property which has escaped taxation in prior years, to the taxes of those years, does not deprive one of due process of law when opportunity to question the validity or the amount of the tax is given. Winona, etc., Land Co. vs. Minnesota, 189 U. S. 537."

In the case of Weyerhauser vs. Minnesota, 176 U. S., 556 (a back tax case), the court said:

"If, against what may be detriment in that (the back tax assessment), the land owner can be heard, he is afforded due process within the rule announced by the authorities."

In the same case, page 557, the court said:

"The Constitution of the United States was satisfied if an opportunity be given to question the validity or **amount of the tax**, either before that amount is determined, or in subsequent proceedings for its collection."

In the **back tax** case of Gallop vs. Schmidt, 183 U. S., 307, it was said that:

"Due process of law is afforded litigants if they have an opportunity to question the validity, or the amount, of an assessment, or charge, before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered."

In Bristol vs. Washington County, 177 U. S., 147 (a back tax case), it was decided that:

"There was no want of due process, for while a non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded."

THE LETTER OF JANUARY 27th, 1905, FROM THE COMPTROLLER TO JACOB PHINIZY, PRESIDENT, WAS NOT NOTICE AMOUNTING TO PROCESS WHICH WOULD SUSTAIN THE ASSESSMENTS ISSUED FEBRUARY, 7th, 1905.

While the defendant denied that any notice was necessary in the assessment of back taxes, he yet contended that if notice was required, it had been given in the letter from the Comptroller to Jacob Phinizy, President of the Georgia Railroad & Banking Company. Record 126.

There are two sufficient answers to this position.

1. The letter was not process to the Georgia Railroad & Banking Company, but an "inquiry" addressed to Jacob Phinizy, who happened to be President of the Company. It was not even an invitation to attend, at a time and place fixed by Statute, or the letter. There was nothing to indicate that there was to be any hearing; but it rather showed on its face, that the Comptroller intended to assess without a hearing, from such information as he could obtain under the provisions of Pol. Code 813.

2. The letter, in the nature of the case, could not be notice in the sense of process, because the Supreme Court of Georgia held that, under the Statute, the Plaintiff "was entitled to no notice, hearing, or arbitration." Record 165 (11) 180.

That being true, there could be no process, no matter what information the plaintiff may have had as to the contemplated action by the Comptroller; for—

"DUE PROCESS MUST BE PREDICATED UPON THE TERMS OF THE STATUTE, NOT UPON FAVOR OR ACCIDENT."

"It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hear-

ing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be contested, not by what has been done under it, but by what may, under its authority, be done. The Legislature may prescribe the method of notice, and the mode in which it shall be given, but it cannot dispense with all notice."

Stuart vs. Palmer, 74 N. Y., 183, 188.

Each term and phrase,—"Due Process of Law,"—is important; it must be **due**,—that is, reasonable fair, just; it must be **process**, not a letter, nor an invitation to be present, or information as to the pendency of a suit,—but **process**. It must be **process of law**, not of grace, or favor arising out of the inherent instinct of fairness on the part of the officer seeking to give the notice, which the Statute ought to have required; but opportunity to be heard must be demandable as a right.

Even if the Valuation had Been Correct, or if the Defendant had been Liable in Fact, the Assessment Would Still be Void, Because Issued Without the Right to be Heard.

"The fact that the defendant may have been liable, was immaterial in considering the validity of the judgment. Whether, in fact, the individual has a defense, or by way of exemption, or is without defense, is not important. To assume that he has none, and therefore is entitled to no day in court, is to assume against him the very point he may wish to contest."

Reese vs. City of Watertown, 19 Wall, 123.

In this connection, we may consider the 8th Assignment of Error which alleges that

The Georgia Statutes are Unconstitutional Because They do not Afford Due Process of Law in the Assessment of Back Taxes.

In the court below, the plaintiff contended:

1. That the Georgia statutes did not authorize the Comptroller-General to assess back taxes.

2. That if they did, they were unconstitutional, because they did not provide for a notice and an opportunity to be heard in the assessment of such back taxes.

The court, at great length, considered the first proposition, and decided that the Georgia statutes did authorize the Comptroller to assess omitted property for former years.

The court did not discuss the question of due process of law further than was involved in the one single sentence that the statutory "scheme was constitutional."

This, therefore, makes it necessary to consider what was the statutory scheme.

NO ROVING COMMISSION WITH POWER TO ASSESS AT ANY UNCERTAIN TIME.

Pol. Code, 813, provides that "in case of failure to make return, the comptroller must make an assessment from the best information he can procure, which assessment shall be conclusive."

Plaintiff contended that this section was limited to the current year; for, "if language can be construed as relating to assessments for the current year only, it will not be extended to embrace exceptional assessments of property omitted in previous years."

Parkinson vs. Jasper Co. Tel. Co. 67; N. E. R., 477.

"There must be a period when, for obvious reasons of policy, the assessment roll, in any given year, must be regarded as completed."

Overing vs. Foote, 65 N. Y., 276.

For if the assessors can go back one year they may go back indefinitely * * * such power would be impolitic

and evil and expose all men who, whether ignorantly or wilfully, had, at any time, understated the quantity of their land * * * to vexatious or malicious prosecutions."

Sudderth vs. Briton, 76 N. C., 461.

Whiting vs. City Council of West Point (Va.), 17 S. E. R., 1; and Stockman vs. Robbins, 80 N. C., 196; Meade vs. Story, 93 N. W., 89.

CLOSED BOOKS, NOT CLOSED DOOR.

On the authority of these, and similar cases, plaintiff contended that the tax books closed on October 1, when the taxes for the current year became due and payable—or, in any event, the tax books closed on December 20th, when executions were required to issue for taxes then unpaid; that the books being closed, a new notice and a statutory right to be heard, was necessary before any entry could be made thereon in the nature of a re-assessment, or the addition of omitted property.

The State Supreme Court disapproved of this position, holding that, not the books, but the "door of opportunity" was closed.

In effect, it held that the books remained opened, but that the "door of opportunity" was closed, to prevent the citizen from being heard.

In other words, the books were open to the officers of the tax court to make back tax assessments, but the door of the court was closed against the citizen to be affected by the entry on the open book.

The court held that the failure to include property in a return did not relieve the taxpayer from his obligation to pay the tax which he had escaped, whether that escape was fraudulent, or in good faith, and that there was a failure **"in a present duty."**

But a party is as much entitled to a hearing on the question as to what is his present as to what was his past obligation. There must be a method by which the existence and extent of his present obligation is to be determined after a hearing. This was recognized in the case of Walker vs. Whitehead, 43 Ga., 551, (Reversed 16 Wall., 314), cited by Supreme Court of Georgia, for, there, the statute attempted to enforce the payment of a tax, not by an assessment without a hearing, but by a penalty, which penalty was held by this Court to be unenforceable. (16 Wall, 314.)

COMPTROLLER'S IMPLIED POWER TO BACKTAX.

Plaintiff did not contend that the acceptance of a return which did not include all its taxable property operated as Res Adjudicata, or estopped the State from thereafter collecting tax on the omitted property.

What the plaintiff did claim was that, under the existing statutes, the tax books were closed at the end of the current year, and that there was no machinery for a hearing on the back tax assessments.

Answering this contention, the Supreme Court conceded that Pol. Code, 813, did not, on its face, authorize the Comptroller to back tax. It held, however, that, by implication, he was clothed with the same power in this respect as that possessed by the county tax officers.

The Court then quoted section 949 (2), (11), enumerating the "Duties of the Tax Collector:"

2. "To search out and ascertain, as far as possible, all polls and professions, and all taxable property not returned to the receiver, or not found on his Digest."

There is no suggestion of a hearing or notice in this clause. The Court then quoted Sec. 949 (11), which enumerates, as one of the duties of the tax collector:

(11.) "To issue executions against all tax defaulters * * * for any and every year preceding and including the years for which they are collected."

But the tax collector is like a sheriff. He is the ministerial officer who collects taxes. Plaintiff contended that this section authorized the collector to issue executions against persons whose names were on the tax digest, and who had not paid what the digest showed they owed. At any rate, there is no provision in this section for making assessments or giving the alleged delinquent an opportunity to be heard.

The Court then cited Pol. Code, 847, which provides:

"If a person fails to make a return, in whole or in part, it is the duty of the receiver to make the valuation and assess for taxation, and double the tax in the last column."

Plaintiff contended that this section necessarily related to the taxes of the current year, since the tax receiver was obliged to turn over the tax digest on August 1st of each year (Pol. Code, 838), and thereafter had no custody of the books. So far as the tax receiver was concerned, the book was not only closed, but it was out of his possession.

The Court then cited Pol. Code, 855, which provides that:

"Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default."

Plaintiff contended that this section was not only silent as to the right of the receiver to assess for back taxes **without a return,** but that this section was a codification of the Act of 1813 (Cobb's Digest, 1059), passed at a time when, so far from authorizing the receiver to assess without a return.

BACK TAXES IN GEORGIA WERE THEN ENFORCED BY SUIT.

This suit would afford due process of law. The provision is found in the Act of 1804, Sec. 8 (Cobb's Digest, 1047), and Sec. 18 (Cobb's Digest, 1050). These two sections provide as follows:

Sec. 8. "If any person shall neglect to give in a return of his taxable property, or shall be convicted of making a false return, he shall be liable to pay a fine of ten dollars

for every hundred dollars valuation so neglected or concealed * * * to be recovered in any court having cognizance of the same."

Sec. 18 provided in addition, that:

"Every person neglecting to give in a list of his taxable property shall pay for every such neglect * * * 80 cents on every hundred dollars value * * * to be recovered by bill, plaint, or information before any court of record * * * provided, always, that such information, or presentment, shall be made within twelve months after such neglect or default."

In Gorman vs. Hammond, 28 Ga., 85, it was held that the provision in the Act of 1804 providing for the recovery, by suit, of the fine of ten dollars for every hundred dollars valuation concealed, had been repealed by the Act of 1845 as to double tax.

NO FIXED TIME AND PLACE FOR ASSESSING BACK TAXES.

Whatever the power to collect back taxes, and whatever the machinery, there is no fixed time, or place, when the assessment is to be made. In this case, the Comptroller began by making 22 assessments for the years 1882 to 1904, inclusive; and, from the examination of the statutes, it will be seen that both separately and collectively they provide for no notice, and fix no time or place when the officer is to pass on the question of back taxes. Glidden vs. Harrington, 189 U. S., 257. As construed, they leave the back assessments suspended like the sword of Damocles to fall, not at a fixed time and place, not after notice and opportunity to be heard, but at the uncertain and arbitrary will of the officer, whenever he chooses to cut the hair, even though it might be, as here, many years after the same officer had received the return and considered it as a closed incident. This same officer, during those years, did not consider foreign stock taxable, and had they been included, would not have taxed the same. This officer lets the sword drop even though the judgment he issues is not "responsive to the pleadings." Reynolds vs. Stockton, 140 U. S., 240 (bot). The only

pleading was the return of the company, to which no objection was made, and no traverse filed, as required by Pol. Code, 812. The judgment had been entered on the then pleadings, and the tax due thereunder had been paid.

So that, even if the Comptroller is, by implication, clothed with the powers of the county tax officers, he is clothed with a power that is nugatory, since there is no statutory right afforded the delinquent to be heard.

EVEN IF THE COMPTROLLER HAS THE POWER OF THE COUNTY TAX OFFICERS, THE MACHINERY UNDER WHICH HE ACTS (POL. CODE, 813), PROVIDES FOR NO NOTICE AND OPPORTUNITY TO BE HEARD.

Whatever the source of the Comptroller's power, the machinery for its exercise is found in Pol. Code, 813, which declares that where there is no return, he must assess from information—not that he must give notice and afford the alleged delinquent an opportunity to be heard.

Not only is the statute silent as to any process and right to be heard, but it was intentionally silent.

Not only has the Supreme Court so decided, but

THE DEFENDANT BY HIS ANSWER CONTENDED THAT THE PLAINTIFF HAD NO RIGHT TO ANY HEARING.

By reference to defendant's answer Record 48 (12), it will be seen that the Comptroller contended that the plaintiff—

> "Having withheld and omitted these shares of stock from its returns, it became a delinquent taxpayer as to those shares for each and every year in

which they were omitted from the return, and it thereby waived or lost its right to any further notice or hearing before the Comptroller General or Board of Arbitration. It then became the duty of the Comptroller General under the statutes in such cases made and provided, as soon as he discovered the default, to assess the same from the best information he could procure."

It is true that by a subsequent amendment (Record 50) the defendants contended that the plaintiff had a right to make a "return nunc pro tunc," and that this right to make such "nunc pro tunc return" continued up to the time that the assessments were signed by the Comptroller. This contention in the amendment was not sustained, for the Supreme Court construed the statute as the defendant had insisted it should be construed in the original answer, and held that:

"When one fails to return in whole, or in part, fraudulently or through an honest mistake, **he then and there** becomes a defaulter, and the door of opportunity is closed to him so far as the right to have the mutual rights between himself and the taxing power adjusted by arbitration is concerned." Ample "machinery" is available to the citizen who makes full return; deprivation of the right to be further heard is one of the penalties visited upon the defaulter * * * Record, 180.

"To the defaulter no machinery is furnished for the correction of his own error; he is entitled to no notice, hearing, or arbitration." Record 165.

If such be the statutory scheme, it is a violation of the Fourteenth Amendment, which, in guaranteeing due process of law, imposed an absolute limitation on the power of the General Assembly and made null and void any such system by which back taxes or any other charge might be assessed without a hearing. The amendment was intended to prevent just such oppressive legislation.

PRACTICAL EFFECT OF CONSTRUCTION.

Inasmuch as all the powers held to be conferred upon the Comptroller are not expressed in Political Code, 813, but

some of the powers are derived by implication, it will make for clearness of illustration to suppose that there was an Act expressly authorizing him to do exactly what he has done.

We would then, in effect, have a statute like this:

AN ACT.

To provide that where a taxpayer has **bona fide** made a return which has been accepted without objection, the Comptroller General or his successors, upon learning that the taxpayer owns property which, in excusable reliance upon universal practice and contemporaneous construction, was, in good faith, omitted from the accepted return, may, at any time, and without notice, assess said owner for back taxes and interest on said omitted property for seven years preceding such assessment, at a valuation to be fixed by the Comptroller without evidence, but from the best information he can obtain; and such assessment against such innocent **bona fide** taxpayer, though he did not conceal his ownership of such property, but, in common with all other citizens and the tax paying department, treated such stock as non-taxable, shall be conclusive. Such citizer being deprived of the right to be heard, and the door of opportunity being closed, as a penalty.

Such an act would be equivalent to a Bill of Attainder.

Peoples vs. Hayes, 140 N. Y., 484.

It would be worse than a bill of Attainder, for, to give notice during the current year, accept the return, and years after, without notice, to change the judgment, would be worse than no notice at all. One is an arbitrary denial of due process. The other would be for the sovereign to accept the return, and allow a citizen to depart on the idea that it

was satisfactory, and then, later, subject him to the burden of a conclusive judgment issued without a hearing.

The inherent and changeless equity which entitles even a wilful wrongdoer to a hearing before he is condemned, is doubly due to one who innocently relied on the practice of the Comptroller General himself in treating foreign stock as non-taxable.

AUTHORITIES CITED BY STATE COURT TO SUSTAIN THE PROPOSITION THAT ASSESSMENT MIGHT BE MADE WITHOUT A HEARING.

The Plaintiff's pleadings alleged that the assessment issued in violation of the 14th Amendment, and in stating the issues, the Supreme Court of Georgia, in the opinion refusing the Injunction, states that the Plaintiff alleged that the assessments were void because issued without due process of law. With that single exception, the phase is not again used. The constitutional question is not again mentioned, except in one short sentence, where the Court, after showing that the Georgia statutes closed the door of opportunity and deprived the Georgia Railroad of the right to be heard as a penalty, said:

"Whether or not it is consistent with wise public policy, we do not undertake to determine, that it is not unconstitutional, we are fully satisfied." Record 180.

To support this sentence upholding the validity of a statute providing for no opportunity to be heard, the Court cites Hager vs. Reclamation District, 111 U. S. 701, and Pittsburg R. R. v. Backus 154 U. S., 426, both of which are leading cases in establishing the proposition that notice is necessary at some stage, and that the citizen must be afforded an opportunity to be heard on the charge sought to be enforced against his property.

The other cases are not in point on the question as to whether the Plaintiff was afforded Due Process of Law, for

1. None of the cases cited involved the question of Due Process of Law, and none of the cases discuss whether the Back Assessments issued in violation of the 14th Amendment.

2. These cases construe the Tax Statute. None of them involve the validity of the Statutes.

3. These cases applied to taxes for the Current Year, and relate to changes during the term, as to which the plaintiff had the right to be heard, because there was a time and a place fixed by the statute, when the citizen could be heard as to the changes.

NO JURISDICTION TO FIX VALUE OR GIVE AN OPPORTUNITY TO BE HEARD ON THE AMOUNT OF THE TAX IN THE PENDING SUIT.

After the Remittitur was returned to the Lower Court, and after the statute had been construed to deprive the plaintiff of the right to be heard, and it had been held that the assessment was conclusive, the defendants on the final hearing shifted their position and by an amendment filed January 30, 1906 Record 54 (5) prayed that the court would find and decree that the true market value of the stock is as "assessed by the Comptroller-General."

The plaintiff objected to this amendment on the ground (Record, 11 (6) that "there was no jurisdiction in the Superior Court of Fulton County to assess the said stock for taxation, nor to re-value said stock for the purpose of taxation."

The court ruled that it "could not, in this cause, decide or fix the value of said stock for the purpose of determining an amount for which executions for taxes should issue," but would hear evidence with a view of determining whether said assessments were excessive. Record 11 (6).

The Supreme Court having in this very cause decided that the assessments were made conclusive by statute, it would have been worse than useless for plaintiff to have gone into the question of the re-valuation of the stock for the purpose of fixing an amount for which new executions should issue. No amount of evidence would have enabled Plaintiff to obtain relief. For the assessments were declared to be conclusive, and could not be set aside even if they were shown to be excessive unless there was **proof of fraud and corruption on the part of the officer.** Record 153 (bot.).

So that, the Legislature by its statute, the Supreme Court of the State, in construing the statute, and the Superior Court by a ruling in this cause, have held that plaintiff was not entitled to be heard before the Comptroller, nor was the plaintiff entitled to have the value of the stock fixed in the pending cause.

The case, therefore, is taken out of all the classes of cases referred to in the books where due process of law was afforded after, if not before, the assessment was made. The statute here did not give any right to a hearing before the assessment was made, and there was no opportunity thereafter to fix the tax before it became effectual and no right to contest its validity in a court of equity, as in Davidson vs. New Orleans, 96 U. S., 97, and Hager vs. Reclamation Dist., 11 U. S., 711.

SECURITY TRUST COMPANY V. LEXINGTON

203 U. S. 323.

Since the argument in the Court below, and since the preparation of this brief, this Court has rendered a decision which the Plaintiff contends is exactly in point, and rules that the statute must provide a right and opportunity to be

heard in order to support Back Tax assessments. This decision, plaintiff contends, answers the contention of the defendants that the original notice in 1895 would support the new judgment in 1905.

The Winona, Weyerhauser and Gallup cases, cited above, are charged with the **negative pregnant** that Back Tax assessments would be void unless the statute provided the right and opportunity for the property owner to be heard.

The case of Security Trust Co. vs. Lexington, 203 U. S. 323, **affirmatively declares** that the new notice is necessary, and that a conversation or letter announcing the officer's intention to Back Tax, is not sufficient unless the statute itself gave the citzen an opportunity to be heard. For convenience of reference, extracts from this opinion are here made:

"The Taxing Officer could not take any such tax books and without notice impose a conclusive assessment for Back Taxes, for the particular year the book had been made use of as an assessment book. Such assessments could not be enforced, unless the taxpayer could thereafter, at some time, as a matter of right, be heard upon the question of the validity and the amount of such tax. The general statutory notice as to the regular assessment proceedings cannot be regarded as notice of this special assessment made years after the completion of the old assessment," 203 U. S. 323. (Bot.) (Although the taxing officer, as a fact, in that case, gave notice of his intention to assess); there was no

"Notice made necessary by the statute in regard to such special assesment * * * there was no statutory obligation imposed on him to again examine the books, lest perchance they may have had an interlined assessment made in them, for the making of which the law provided no notice * * * subsequent assessments placed in such book, and not appearing on any book when sent to the auditor by the assessor, would not be made under any statutory provision for notice, and would not afford the taxpayer an opportunity to be heard before the board of equalization in regard to the illegality of such tax." 203 U. S., 332 (bot.)

"If the statute did not provide for notice in any form, it is not material that, as a matter of grace or favor, notice may have been given of the proposed assessment. It is not

what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by Statute. Before this special assessment could be actually enforced the taxpayer must have an opportunity to be heard as to its value and extent. In Weyerhauser vs. Minn., 176 U. S., 550, it was held that the taxpayer was entitled to an opportunity to be heard before the tax would be enforced. . . . The statute now before us does not provide for a notice of the special assessment, nor did the plaintiff have an opportunity to be heard as to the assessments before the Board of Equalization." 203 U. S., 333.

Applying this case to the present, it will be seen that it is directly in point. The Georgia Statute (Pol. Code 813).

1. Makes the assessment conclusive;

2. It made no provision for notice;

3. The door of opportunity was closed;

4. The plaintiff was held to be entitled to no notice, hearing, or arbitration;

5. The plaintiff was deprived of the right to be heard as a penalty;

6. "**And must bear the burden of the assessment made in conformity to the law.**" (Record, 153, bot.) which gave no right to be heard;

7. As to the taxes for 1895 to 1902, and for which years the property had been assessed by the Comptroller, "**whether the property had been excessively assessed cannct now be inquired into.**"

8. The void assessment for the years 1895 to 1902 were "ordered to proceed";

9. The Plaintiff's warehouse has been levied on under fi fa's issued on assessments which were made without an opportunity to be heard, and under the judgment ordering these executions to proceed, it is sought to take plaintiff's property by sale; i. e. the property is to be taken without due process of law.

It is true that in Security Trust Co. v. Lexington, 203 U. S. 323, the city collected what was ultimately found to be due as Back Taxes. But the collection was made, not under the void assessment, issued without due process of law, but by virtue of a decree rendered after a hearing which found affirmatively what was the amount of tax due, and which finding was for a sum much less than that for which the void assessments had issued.

AS A RESULT OF THE CONTEMPORANEOUS CONSTRUCTION FROM 1895 TO 1902 THAT FOREIGN STOCK WAS NOT TAXABLE, THE FAILURE TO TAX OTHER PERSONS DURING THE SAME YEARS, AND PLAINTIFF'S RELIANCE ON THE UNIVERSAL PRACTICE AND CONTEMPORANEOUS CONSTRUCTION IT CANNOT BE TREATED AS A DEFAULTER NOR DEPRIVED OF THE RIGHT TO BE HEARD AS A PENALTY, NOR TAXED WHEN EVERY ONE ELSE HAS BEEN EXEMPT BY REASON OF THE CONTEMPORANEOUS CONSTRUCTION.

A party is entitled to be heard as a matter of right, even where he is liable, in fact, or where the same judgment would be rendered after a trial as that rendered without a hearing. The very question in issue can never be assumed against him. Reese vs. Watertown, 19 Wall, 123; 1 Cooley on Taxation (3 ed.) 632; Thornburg vs. Hardell, 98 N. W. Rep., 131.

But the plaintiff here is not complaining of the denial of a mere technical right, but one of substance. It denied that it was liable for any sum, because every one else had been exempt from taxation on foreign stock. It claimed that as a result of the assessment without a hearing, it had

been taxed on the fee when it only owned a Reversion; that it was not allowed a reduction of 33⅓ per cent allowed all other taxpayers, and it further contended that even if it was taxable on the fee, the assessment was enormously beyond the value of the property.

It contended that it was specially entitled to a hearing as a matter of simple justice, because it was conceded that it acted in good faith, and in reliance on the universal custom acquiesced in by the taxing department not to tax foreign shares.

All these facts brought the case not only within the letter but within the spirit of the Fourteenth Amendment, which will not tolerate a judgment that is not "in conformity with natural justice." (187 U. S., 51), which will not give viladity to a decree that is "arbitrary, oppressive, or violative of fundamental rights." (Howard vs. Ky. 200 U. S., 167); or that works out "inherent injustice." The amendment looks not to the form, but to the substance, and prohibits every device which would tend to make the constitutional safeguard "**a mere rope of sand.**" Simon vs. Craft, 182 U. S., 427, 436; Chicago R. R. vs. Chicago, 166 U. S., 226.

In other words the intent set out in the Preamble to "**establish justice**" is guaranteed by the requirements of due process. Justice—not merely a hearing—but justice, promised in the Preamble is to be secured and insured by the command for due process of law in the Fourteenth Amendment.

Now, here was a case where there was certainly "excusable neglect," and "probable cause" justifying the plaintiff in relying on the practice of the Taxing Department and the contemporaneous construction of the law. The Comptroller himself was so much in doubt as to whether foreign stock was taxable, that in May 1901, he asked the opinion of the Attorney General.

Two courts and four judges (Judge Newman in the

United States Circuit Court and the Court of Appeals) held that the stock was not taxable, and supported their opinion by quotations from the Supreme Court of Georgia in Wright vs. Southwestern, 64 Ga., 799.

When this Court held that such stock was taxable, it put the decision on the self-executing provision of the Constitution of 1877. When the Supreme Court of Georgia decided this case, they held that foreign stock was not property taxed by the Constitution, but that it was a peculiar class of propery having no inherent value, but was subject to be made taxable by a Statute.

THIS WAS NOT A CASE OF IGNORANCE OF THE LAW, BUT OF RELIANCE ON THE LAW.

In a case where the practice was one way and the law was ultimately decided to be another; where courts differed as to results, and where those agreeing as to results, disagreed as to reasons; there was certainly an "excusable neglect" on the part of the plaintiff in failing to return the property. It certainly had "probable cause" for omitting to return the shares.

Now to treat it as a defaulter, and to punish it as such is in effect to punish it by an **ex post facto** law. To deprive it of the right to be heard as a penalty; to make that an offence which was not considered unlawful at the time it was committed, is equivalent to a Bill of Attainder. To follow that up by a "sentence" (Chicago, etc. R. R. vs. Chicago 166 U. S., 235) and to close the "Door of Opportunity" is to deny it due process of law, for it is deprived of fundamental rights. It was not only deprived of the right to be heard, but it was punished for an act innocent at the time of commission. In the language of the RATTERMAN case * * * * * * * * * * * * **"to throttle it with a maxim** that **'ignorance of the law excuses no one'"** * * * * * * * * * **"is to work out hardship and oppression;"** to punish for no crime, but to make a crime out of that which

was universally regarded as innocent. For this is not a case of ignorance of the law, but of *reliance on the law* as administered by the Taxing Department; and such reliance cannot be converted into an offense subjecting one to a great and onerous penalty, which penalty, not only deprives one of the right to be heard, but, in effect, subjects him, under the name of "Taxes," to a fine, by which he is made to pay, where no one else is made to pay, on an assessment that was itself excessive.

In this connection, we may consider the

TENTH ASSIGNMENT OF ERROR.

That the judgment of said Supreme Court affirming said judgment and decree of said Superior Court was error in this, because there is no law of force which affords petitioner the right or opportunity to be heard on the assessment of back taxes on omitted property; that by the universal practice foreign stock was treated as non-taxable, and that a new construction of the law and a new practice of the taxing department should not be given retroactive effect; but should be prospective only, and that the assessment of taxes on said foreign stock for the years when the same was not treated or regarded as taxable without affording petitioner the right and opportunity to be heard is unreasonable, arbitrary and unjust and takes from petitioner its property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

CONTEMPORANEOUS CONSTRUCTION OF THE ACT OF 1885 THAT FOREIGN STOCK WAS NOT TAXABLE, HAD THE EFFECT OF A JUDICIAL DETERMINATION. THE DECISION IN 1905 THAT SUCH STOCK WAS TAXABLE WILL NOT BE GIVEN A RETROSPECTIVE EFFECT.

The Supreme Court of Georgia, having declared that Foreign Stock was not taxed by the Constitution, but only by the Act of 1885, the Statute, if valid, could be abrogated by any of the ways known to the law. Among the recognized means by which this could be accomplished, was general and long-continued practice and contemporaneous construction of the taxing department, that such stock was not taxable.

Considering the injustice that would inevitably result from disturbing a long-continued and general construction of an Act, (8 Cyc. 738, 736);

Considering that the back tax now would put the burden on present stockholders, which should have been borne by the stockholders of the current years past.

Considering and applying the maxim **communis error facit jus** (Ezekeil vs. Dixon, 3 Ga., 153);

Considering that the law is not intended as a trap to catch those who rely on the current and received opinion of the taxing officers;

Considering the natural equity and constitutional provisions which must even control States when they seek to impose penalties for acts of omissions which, at the time, were considered lawful by State and citizens alike;

The Court will treat the construction given by the taxing officers as having "**The force of judicial determination.**" Bruce vs. Schuyler, 4 Gilman, 221,—46 Am. Dec. 450;—Cook County vs. Healy, 78 N. E. Rep., 625.

The contemporaneous construction, thus having **"The force of judicial determination,"** will be applied **"In analogy to the principle of res adjudicata,"** and the correct decision will be given a prospective, and not a retrospective effect.

It is to be noted that this case does not involve the financial system of the State. It does not jeopardize the revenues of the Government for the current year. It is proceeding concerning taxes for years which have passed, and is not against a large number of the people, but only against two, and these two, it is conceded, acted in good faith, and in accordance with the contemporaneous construction.

Under the facts, the decision declaring that this contemporaneous construction was incorrect:

"Will not be allowed to have greater effect than a simple repeal, sustaining all acts done and all judicial proceedings had under it before such declaration, in analogy to the principle of res adjudicata." Herndon vs. Moore, 18 S. C.

In Taylor vs. Ypsilanti, 105 U. S. 60 (2), citing Ohio Life Insurance Company vs. Deboldt, 16 Howard, 416,-432, this Court showed that not only the decisions of the Courts, but the practice of the Departments of the State Government, would be considered in determining whether a new rule of construction was to be given only a prospective effect. Covington vs. Bank, 198 U. S., 114; Sutherland Stat. Con. (1 ed.) Sec. 307-312.

THIS DOCTRINE OF CONTEMPORANEOUS CONSTRUCTION HAS BEEN APPLIED IN TAX CASES.

The Supreme Court of Kentucky in Franklin County vs. Louisville & Nashville, 25 Am. & Eng. R. R. cases, 535, held that where there had been a failure to list property, because of a decision that such property was not subject to taxation, the fact that it was subsequently decided that the law was misinterpreted will not authorize the collection of the tax on the same property during the period which the law, as

announced and understood, did not require such property to be listed. (H. N.) * * * Rights were acquired and duties performed in accordance with the then law as announced and understood * * * It is equally just that the same rule should apply as to duties required of them, such as listing of their property for, or the payment of, taxes. Otherwise, they would not know when or how to act safely as to investment.

The attention of the Court is called to the case of Ratterman vs. Phipps, 4 Ohio Decisions, 453, which was a case much like the present in that the State attempted to back-tax a citizen on stock which he had omitted to return, because of the general understanding in the community that the property was not taxable. The taxing officers there treated him as a defaulter just as the Comptroller did the Georgia Railroad in this case, and it was argued that his ignorance of the law afforded no excuse. The Court said:

"To adopt this proposition under the circumstances of this case would be iniquitous, pure and simple. For thirty-four years, this stock was not only regarded as non-taxable, but it was a matter of public notoriety that the stock was of non-taxable character. Investors sought it not only because they believed it non-taxable, but because by universal custom and opinion, the fact was established that it was non-taxable * * * While custom did not make the law for this stock, yet it is established that the custom made a characteristic and attached it to the stock which was that of non-taxability. The taxing department of the State, which was of jurisdiction here, had for that length of time not only failed to tax the stock, and concurred in the general opinion and maintained the practice of non-taxing, but declined to tax when the ownership of the stock was disclosed to them. "To stop his mouth with any such phrase as 'ignorance of the law, excuses no one, would be to throttle him with a presumption so falacious as to be ridiculous * * * To brand him as a defaulter because he had no individual opinion against the opinion of the taxing department, would be to work out in the administration not justice but a **reductio ad absurdum**."

It so happens that there is a Georgia case dealing with facts almost identical.

In Mayor of Macon vs. Jones, 67 Ga., 489, it appeared that for many years the City of Macon had failed to tax

its own bonds. In 1881 the Treasurer issued twelve tax fi fa's against Jones for taxes on $14,000 of bonds for the years 1870 to 1881. Jones admitted the ownership, but sought to enjoin the fi fa's on the ground that the bonds were not taxable, and on the further ground that "the city had never before demanded taxes from any one on such bonds, although it knew that many of them were held in Macon."

The city made the same reply that the Comptroller does here, and declared its purpose to tax all bonds whenever they might have the knowledge that others in the city owned them, but said that the council did not know who owned the bonds, because they were transferable by delivery. Judge (afterward Chief Justice) Simmons granted the injunction. In the opinion, Judge Jackson, after discussing the taxability, used language that embodies the spirit of the Fourteenth Amendment. He said:

"Further, we do not see clearly the fairness of enforcing a tax ordinance of former councils of the city, when those councils did not enforce it themselves, upon one citizen to the exclusion of others, especially—and more especially, when another has been relieved by council from a like imposition * * * in view of all the facts set out in this record, we cannot say that the chancellor, in the exercise of the power which the great principles of equity place in his hands to protect the weak against the strong, and shield the citizens against the corporate powers of the city, erred in the grant of this injunction."

There is another Georgia back-tax case which embodies the same principle. When back taxes were sought to be collected under similar circumstances, the Court asked whether an equitable bar should not be applied when, "on account of the lapse of time, and for other sufficient reasons, it would be inequitable, or unjust, to enforce collection." Staten vs. S. F. & W. Ry., 111 Ga., 803.

17th Assignment.

SITUS OF FOREIGN STOCK NOT IN GEORGIA AND NOT DUE PROCESS TO TAX IT HERE.

In the test case of Wright vs. L. & N., 195 U. S., 219, record, this Court held that foreign stock was taxed by the **self-executing provisions of the Constitution of Georgia requiring all property to be taxed.**

The Supreme Court of Georgia took an entirely different view, and held that while the Constitution of Georgia requires all "**property**" to be taxed, and while, in a certain sense, stock was "**property,**" yet it had no inherent or intrinsic value, and, therefore, neither domestic nor foreign stock was taxed by the Constitution, but could be made taxable by statute. That such statute had been passed in 1885 declaring foreign and domestic stock both to be property, and, as such, taxable, that while domestic stock had been subsequently made non-taxable, the Act of 1885 taxing foreign stock was left in full force. It, therefore, determined that there was no discrimination in taxing foreign and excepting domestic stock under the Constitution, and, hence, no denial of the equal protection of the law.

The Supreme Court of Georgia also held (record, 172), that the decision in Wright vs. Southwestern, 64 Ga., 783, "that stock in a railroad is really but so many shares of its property, and that property is real estate for the most part, at least, and taxable in the State in which the road is located," was of binding effect, having the force of a valid statute; citing Heard vs. Russell, 59 Ga., 54.

It also held (record, 172) that that decision remained in force until the Act of 1885 gave foreign stock a local situs.

This presents a question which, so far as we have been able to find, has never been adjudicated by any court. It raises the issue as to how far the Legislature can give a

situs to stock which the court had authoritatively determined had no situs in the State.

Where the law is silent as to situs, and the necessary facts exist, the Legislature may break the silence and declare that personal property or choses in action has a situs in the State of the owner's residence.

But Wright vs. Southwestern R. R. was not only decided after the Constitution of 1877, but it is said by the court in this case that it was binding authority, and that it remained of force until 1885.

Consequently, when the Legislature of 1885 met, there was a binding and **authoritative decision that the stock was not here.** It had no situs here. It was adjudged that the res—the taxable res—was beyond the limits of the State, and it is respectfully submitted that that decision put the stock beyond the jurisdiction of the General Assembly. It had been held to be real estate, and the Legislature had no more power to tax it than it had to tax any other land in Alabama. When the Supreme Court decided that foreign stock had no situs here, it adjudged a fact—a legal fact which, by its very nature, determined that the property was not in Georgia, and that being true, the Fourteenth Amendment prohibited its taxation in Georgia.

The stock was like that in Mercantile Bank vs. New York, 121 U. S., 162, where this Court said:

> "The Courts of New York hold that they (shares of stock) are not the proper subjects of taxation in the State of New York, because they have no situs within the territory for that purpose."
>
> "The objection will be equally good if made by the non-taxation of real estate owned by citizens of New York, but not within its limits."

Delaware, etc., R. R. vs. Pennsylvania, 198 U. S., 341; Union Transit Co. vs. Kentucky, 199 U. S., 194; Louisville Ferry Co. vs. Kentucky, 188 U. S., 385; Buck vs. Beach (Advance Sheet, S. C. U. S., July, 1907).

WHATEVER THE SITUS, PLAINTIFF ONLY HAD A REVERSIONARY INTEREST AND COULD NOT BE TAXED ON THE FEE.

The fiction of law as to situs must always have a basis of fact in order to support it. The fiction cannot be more extensive than the fact, and the laws of one State cannot operate on an interest in personal property which does not belong to one of its citizens. The taxation of such interest is the taxation of that which is not within the territorial limits of the State.

> Delaware, etc., R. R. vs. Pennsylvania, 198 U. S., 341; Union Transit Co. vs. Ky., 199 U. S., 194; Louisville Ferry Co. vs. Ky., 188 U. S., 385.

The recent case of BUCK vs. BEACH, decided by this Court on May 27, 1907, clearly shows that there are many and constitutional limitations on the power of a State to give personal property a situs for the purposes of taxation, and the cases above cited show that there may be a division or separation of the various elements and forms of value which go to make up a unit, and that these separate interests must be distributed and taxed by the separate States.

The Political Code of Georgia (Sec. 768) recognizes that the holders of an interest less than the fee shall be taxed on such lesser interest.

In the case of stock, where the title is in one, and the beneficial interest in another, the court has held (Central Ry. vs. Wright, 124 Ga., 632) that the real taxable interest is that which is entitled to the beneficial enjoyment—that whoever is entitled to receive the dividends must bear the burden and pay the tax.

But here the Georgia Railroad is taxed, although it is admitted that it has no right to vote the stock, or to collect the dividends.

The deed to the Western of Alabama was subject to the lease for 99 years in favor of Wadley. The stock interest of the Georgia Railroad represented the reversion. The Comptroller recognized that the estate represented by the mortgage should be deducted, and for a similar reason, the interest represented by the lease should have been deducted. Regardless of the situs, the only interest in the Georgia had was the Reversion, and on that alone could it be taxed.

12fh Assignment.

WHERE THE STATUTORY FORM OF RETURN DID NOT REQUIRE FOREIGN STOCKS TO BE LISTED, ONE CANNOT BE TAXED ON ACCIDENTAL INFORMATION THAT HE OWNED SUCH STOCK. THE OMISSION OF THE STATUTE NECESSARILY RESULTS IN THE EXEMPTION OF THE MANY AND PLAINTIFF IS DENIED THE EQUAL EXEMPTION THUS AFFORDED ALL OTHERS.

If a statute had been passed which, in so many words, taxed foreign stock held by these roads, and was silent as to foreign stock held by every one else, the law would have been unfair on its face, and would have been void, because of the Discrimination.

Where exactly the same Discrimination results from the practice of the department, the same legal consequence must follow.

It is like the principle involved in COVINGTON vs. 1st. NAT'L. BANK, 198 U. S., 114, where there was a retroactive statute instead of a retroactive practice, as here. There, the court said:

"It seems to us that in imposing upon the bank a liability for past years for taxes and penalty, upon stock held without the State, and which, before the taking effect of the Act under consideration, it was not required to return, there has been imposed upon National Banks in this retroactive feature of the law a burden not borne by other moneyed capital in the State."

A denial of the equal protection of the law arises from the fact that the statute did not, in terms, require such stock to be returned. In consequence of which, there was a general exemption. The Constitution of Georgia requires that taxes "**shall be collected by a general law,**" Civil Code, 5883, and not by the accident that a particular person happens to be known to own a particular class of property. Here, the statute itself was silent, and by virtue of the silence, the holders of such stock were not taxed, but plaintiff is taxed haphazard and by chance, when the same haphazard does not disclose the names of others equally liable. In other words, it is a case where the plaintiff is taxed because, in its annual reports, it sets out the ownership of 15,000 shares of stock. Others, who do not make such reports, were not taxed, because the law did not call for a return of the number of shares they owned. The small owners escaped through the meshes of the tax net, but the larger holders are caught.

Besides, the question is not to be decided solely by considering the knowledge or practice of the Comptroller, but by the knowledge and practice of the taxing officers throughout the State, to whom the great body of the citizens make their return, and the record contains the **affidavits of 40 taxing officers,** in as many counties, who testified (record, 68-4) "that the owners of stock of foreign corporations, who reside in the State of Georgia, have not returned such stock for taxation, since deponent has been in office, nor has deponent required any returns from such owners of such stock, and this has been the uniform practice of deponent since he has been in office."

Plaintiff could not be required to prove a negative and produce the testimony of every tax officer in Georgia who had acted since 1895. The practice in 40 out of 137 counties not to require a return of foreign stock was sufficient to put the burden on the State to show that this practice did not

correctly represent the practice in the other counties. No such evidence is offered by the Comptroller, and the affidavit which he did introduce from three officers, sustains plaintiff's contentions. These few officers testified as to what they would do, not what they had done in the years from 1895 to 1902.

IT IS NOT DUE BUT UNDUE PROCESS TO BACK TAX FOR A LONG PERIOD DURING WHICH TIME FOREIGN STOCK WAS NOT REQUIRED TO BE RETURNED.

Considering the loss of evidence both to the State and to the citizen; the change in values, and the difficulty of determining what was the value ten years before; the death and removal of many holders of personal property; the impossibility of discovering even a small fraction of those who owned foreign stock, the change of officers of the taxing department, the utter absence of machinery to disclose the amount of foreign stock held during the years, and the fact that restrospective laws are forbidden in Georgia (Civil Code, 5731), that during the period foreign stock was considered not taxable, and that the taxation here is by reason of the accidental knowledge by the Comptroller, when he cannot, in the nature of things, have such knowledge as to the multitudes similarly situated—a law, which would authorize the back tax assessments in such a case, is not due, reasonable, or just. On the contrary it is UNDUE and unreasonable.

Up to the date of the delivery of the opinion of the State Supreme Court in this case, the question as to whether domestic stock was taxable was an open question. It finally held that such stock was not "property' in the sense of the Constitution, and, therefore, not taxable by the Constitution. Suppose the court had held that domestic stock was taxable by the Constitution. Is it conceivable that by a decision reversing the practice of a generation back tax assessments

might have been issued against the few who happened to be known to own the stock, and the multitude of others who were not known, should have been exempt. None of them had been required to return this stock, just as none were required to return foreign stock. To tax the few because of accidental knowledge, and to exempt the many because of inevitable ignorance of their holdings would necessarily have resulted in discrimination—a discrimination that resulted from the silence of the law and the necessary ignorance of the officers as to the existence of property about which no return had been required.

This brings us to the 1, 2, 3, and 12, 13, 14, 15, and 16 Assignments of Errors alleging:

DENIAL OF THE EQUAL PROTECTION OF THE LAW.

(1.) In singling out the Georgia and the Central railroads to be back-taxed on foreign stock, when no one else was taxed, or has been back-taxed thereon for years 1895 to 1902. Record 29; 69 (7); 67; 68 (4).

(2.) In refusing to allow plaintiff the reduction of 33 per cent allowed all other taxpayers. Record 100-106; 139.

(3.) In assessing the stock greatly in excess of its value, and refusing to consider the question and excessive assessment made without a hearing, unless there was an allegation and proof of bad faith and conception. Record 153 (bot.) 75-89.

In a state where classification is forbidden and uniformity of taxation is required, Civil Code, 5883, the Fourteenth Amendments forbids unequal taxation, and requires uniformity in the mode of assessment, as well as in the rate charged. It also prevents the taxation of two owners of foreign stock, when all other holders have not been taxed thereon or proceeded against therefor. Cumming vs. Bank, 101 U. S., 154, 161.

For, in the language quoted by Justice Field in County

of Santa Clara vs. So. Pac. Co., 18 Federal, 385, the amendment was not intended to read:

"Nor shall any state deprive any person of his property without due process of law, **except it be in the form of taxation,** nor deny to any person within its jurisdiction the equal protection of the laws, **except it be by taxation.**" (p. 399.)

The Supreme Court of Georgia recognizes that the constitutional provision means that in matters of taxation no agent of the State "shall deny to any person within its jurisdiction the equal protection of the law." Record, 152.

It also recognizes that such denial might result

(1.) From taxing the plaintiff on foreign stock and failing to collect taxes from other holders of foreign stock, and also; Record 152;

(2.) By allowing other taxpayers a reduction of 33 per cent, and in failing to allow a similar reduction to plaintiff.

It said, however, that the "fact of discrimination is matter of proof," and that it must be established to a "certainty to every intent," so that a preponderance of the evidence as to discrimination would not be sufficient to secure a reversal. Record 152.

AN ADMINISTRATIVE DENIAL OF EQUAL PROTECTION IS NECESSARILY A QUESTION OF FACT, AND THE EVIDENCE CAN BE REVIEWED BY THIS COURT.

In the nature of things, where a citizen alleges that in the administration of the law by the officers of the State, he has been denied the equal protection of the laws, the question is one of fact. And since the remedy for any failure of the right guaranteed by the Constitution, "**is ultimately in this Court upon writ of error,**" Neal vs. Delaware,

103 U. S., 370, this Court can consider the evidence untrammelled by any rule of practice, or conclusive effect given to the verdict of a jury, or construction of the State statute, Carter vs. Texas, 177 U. S., 447, Mitchell vs. Clark, 110 U. S., 645.

If this were not true, the Constituitonal guarantee could be nullified by the verdict of a jury, although it could not be nullified by a statute unfair on its face.

Of course, wherever the evidence is conflicting, the findings of fact by an auditor, by a jury, or by a judge are influential, but a verdict has never been considered conclusive where a party is seeking the enforcement of a constitutional right.

Indeed, the cases seem to assume, without expressly deciding, that this Court will re-examine the facts.

In Cummings vs. National Bank, 101 U. S., 161, where there was a claim that there had been a denial of the equal protection of the law in discriminating against national banks, the court said: "**We must review the decision.**" (P. 155.) * * * "**The evidence, we are compelled to say, shows this to be true of the case before us.**"

In Yick Wo vs. Hopkins, 118 U. S., 373, where, on an agreed statement, the lower court had found one way, this court reached an entirely different conclusion, and said:

"The facts shown establish an administration directed so exclusively against particular class of persons as to warrant and require the conclusion that * * * they are applied by the public authorities * * * with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to all persons by the broad and benign provisions of the Fourteenth Amendment."

In Coulter vs. L. & N. R. R., 196 U. S., 610, this Court carefully examined the testimony, and reversed the lower court, for the reason, among others, that **the prevailing tes-**

timony was that no scheme (of discrimination) **was entertained.''**

In cases, involving the question as to whether the rates are so unreasonably low as to be confiscatory and take the road's property without due process of law, the question is reduced to one of fact. If the findings of the lower court were conclusive, or if, on conflicting evidence (which are always found in such cases), this Court was bound by the view taken by the lower court, the evidence would not be examined, further than to see if there was any testimony to support the findings. But such has not been the practice. On the contrary, in Smythe vs. Ames, 169 U. S., 466, there will be found a most careful review of the enormous volume of evidence, and in San Diego Land Co. vs. National City, 174 U. S., 760, the court said ''there is evidence both ways,'' and on an examination of that evidence, reached the conclusion that the rates did not take the property without due process.

Taking the evidence most strongly against the plaintiff, the case is clearly within the principle announced in ILLINOIS CENTRAL vs. INTER-STATE COMMERCE COMMISSION, decided May 27, 1907 (Advance Sheets U. S. S. C. p. ____), where the court said **''there was a salient circumstance about which there was no uncertainty.''**

By reference to the Brief of Evidence, it will be seen that there was no conflict, but, in effect, a confession and avoidance. The facts on which the plaintiff relied were, in part, admitted, and, in part, established by uncontradicted testimony. The Comptroller's evidence was in the nature of an excuse, but even the excuse that he knew of no other delinquent holder of foreign stock was itself an admission of the allegation in plaintiff's petition that it would be a denial of the Equal Protection of the law to tax plaintiff because of the accidental knowledge of its holdings when every other holder was exempt under the practical operation of the law.

But, it was (record, 152) said that, in this class of cases,

there must be "certainty to every intent." That language from Ah Sin vs. Wittman, 198 U. S., 500, was not used in reference to weighing evidence, but in reference to an agreed statement of facts which was silent as to an essential link. The court was asked to supply the link by inference. It held that when there was an agreed statement of facts, it would not go beyond the same. But that ruling cannot be applicable to a consideration of evidence. There is almost invariably conflict in the testimony, and to say that any conflict destroys "the certainty to every intent," and that the plaintiff, as ruled by the Supreme Court of Georgia, could not secure relief by establishing his contention "by a preponderance of evidence," would be to nullify the amendment and to make the constitutional guarantee perfectly easy of evasion. It would be to elevate the verdict of a jury even though against the preponderance of the evidence, to a position where it could accomplish what could not be done by the Legislature itself. An unfair verdict against the preponderance of the evidence, could do what an unfair law could not do. Under such a construction, twelve men sitting in a jury box could do what 250 met sitting in the Legislature could not do. The same motives, the same prejudices, the same local conditions, are at work in one case as in the other. In fact, the jury are less trammelled, because they find according to "the opinion they entertain of the evidence," whereas, the Legislators are sworn to support the Constitution of the United States, including the amendments.

ALL OTHER PROPERTY ASSESSED THROUGH THE COMPTROLLER'S OFFICE WAS ALLOWED A REDUCTION OF ONE-THIRD AND NO SUCH REDUCTION WAS ALLOWED PLAINTIFF.

The Supreme Court of Georgia recognized that allowing other taxpayers a reduction of 33 per cent and allowing petitioner no reduction would be a denial of the equal protection of the law. Relief was not granted, however, because

it appeared that the Attorney-General, in 1904 (a period not involved in this case) had given it as his opinion that this practice was improper, and because the Comptroller testified that he had instructed the officers not to follow any such practice. Record 154, 135, 133.

But if a law fair on its face may, by unfair administration, result in denial of the equal protection of the law, so likewise may instructions of the Comptroller-General be disregarded by boards of arbitration or county officers and an unfair administration of the law be continued. It is not the law, and it is not the instructions, but it is the **practice** of the department that determines the question as to whether there has been an unequal administration of the law. The instructions of the Comptroller cannot, in this respect, be higher than the statute, and if disobedince of the statute may result in actual discrimination, so, too, disobedience of the Comptroller's instructions would have the same result.

Now, the uncontradicted testimony of the Comptroller himself is that **railroads have been usually taxed by boards of arbitration.**. The Comptroller has refused to receive the returns of the railroads, and the companies have refused to accept his assessments, and the result has been that railroads have been assessed by boards of arbitration under Pol. Code, 812. It is, therefore, the practice of these boards that is to be considered, rather than the action of the Comptroller himself. The testimony of the Comptroller is that it was **the plan to allow a reduction of about one-third.** Record 101.

The evidence on this point is uncontradicted though the Comptroller gives it one construction, and the arbitrators another. The Comptroller says that the reduction, which was usually allowed, was for the purpose of fixing a market value. The arbitrators said that it was for the purpose of equalization. But, whatever the reason, the reduction of 33 per cent was allowed.

While the evidence is not lengthy, it is too long to incorporate in this Brief, and the court is respectfully referred to the testimony of the Comptroller himself as to the al-

lowance of a reduction by the Board of Assessors, to be found on pages 138, 139 of the Record.

It will be noticed that, where the reduction was not allowed by the Comptroller it was by the Board, and it will be seen from the Comptroller's testimony, that railroad property was generally assessed by arbitrators. (Record 138 (bot.) So that the practice of the arbitrators must be considered in determining what was the method of administering the law.

The Court's attention is also called to the Comptroller's letter to Forest Adair, (Record 105); to the testimony of Forest Adair himself, and to the evidence of Messrs. Smith, Hammond, and their reading from the stenographic report of the Comptroller's testimony, when examined as a witness before the Assessing Boards. (Record 100-105).

The attention of the court is also specially asked to the TABLES of Railroad Values, to be found on pp. 84-89 of the Record, which show the capitalized value, from 1895 to per cent of such capitalized value, while Plaintiff was assessed at 100.

The Supreme Court of Georgia held that:

THE ASSESSMENTS, THOUGH EXCESSIVE IN FACT, WERE CONCLUSIVE UNLESS THERE WAS PROOF OF FRAUDS AND CORRUPTION IN THE OFFICER.

On this subject, the court said:

"As to those years in which the plaintiff had an opportunity to return its property for taxation, and failed to do so, and for which the property has been assessed by the Comptroller-General, whether the property has been excessively assessed cannot now be inquired into. Under the former ruling in this case, it is concluded by the failure to return the property at the time required by law, and must bear the burden of the assessment made in conformity to law. There was neither averment nor proof that the assessment

was the result of fraud or corruption on the part of the Comptroller-General. If there had been, a different question would have been presented." Record, 153 (bot.)

Under this ruling the court did not consider the evidence in the record tending to show that there had been such an excessive assessment. This was error. 177 U. S., 628 top.

The court, therefore, did not examine the evidence with a view of passing on the questions raised in the motion for a new trial 12 and 13 (record, 59), and the bill of exceptions 14 (record, 14), and renewed in the writ of error to this Court 14 (record, 8). It is, however, necessary for plaintiff to show that this point was not merely technical, and that there was evidence which would have justified a finding that the assessment was excessive had the testimony been considered.

The evidence of Charles G. Goodrich and William E. Bush clearly showed that the stock was worth nothing like the amount found by the Comptroller. Their testimony is circumstantial. They show that for a number of years, all railroad stock in Georgia was greatly depressed in value; that the stocks of the Georgia Railroad, Savannah and Augusta, and Southwestern stocks, where there were guaranteed dividends of 5 to 12 per cent, the most valuable and the most sought-after for investment during the years 1895 to 1900, sold on a basis much below the value at which the Comptroller assessed the Western of Alabama for the same years; that this was true although, as to those roads, 5 and 12 per cent dividends were actually declared. Record 74-79.

The evidence showed that the Western of Alabama for twenty-three years had declared an average dividend of only 2.09 per cent. Record 74, 73.

The Comptroller said that he had fixed a basis on which the stockholders would receive 6 per cent net. But, so far from this being true, the stockholders had received just half of that 6 per cent, and if State, city and county taxes should be deducted, by reason of the fact that the stock was treated as taxable, **the stockholders would receive barely 1 per cent.**

The Comptroller wholly overlooked the effect of taxability in its effect on market value.

The Comptroller also overlooked the fact that the plaintiff was not entitled to the dividends, but really had only a reversion in the stock. If plaintiff was liable for taxes on the stock, it could only be liable to the extent of its interest therein. That interest was represented by an estate for years in Wadley and his assigns, and the reversion at the expiration of ninety-nine years lies in the plaintiff.

The Comptroller capitalized at 6 per cent, whereas, in Georgia 7 per cent is the legal rate of interest, and wherever annuities, dower, remainders, reversions, or other proeprties are to be valued or capitalized the capitalization must be on the 7 per cent basis.

The court in Fla. Cent. vs. Burney, 98 Ga., 5 (bot.), ruling that it was improper to admit the 6 per cent tables, saying that it would be just as proper to introduce the 5 per cent or 8 per cent tables.

The Comptroller had just as much right to capitalize at 1 per cent as he did at 6 per cent.

Of course, where net earnings are capitalized at 6 per cent instead of 7 per cent, the result is an error in the capitalization of about 14 per cent against the railroad company.

In view of the decision of the Supreme Court of Georgia in 98 Ga., 5, and other similar cases, it is as certain as anything can be that the court would have held the capitalization at 6 per cent was improper had it not also held that the plaintiff was bound by the assessment in the absence of an allegation of fraud.

NOT NECESSARY TO PROVE FRAUD, BUT INTENTIONAL UNDER-VALUATION OF OTHER PROPERTY AS COMPARED WITH PLAINTIFF'S IS SUCH A DENIAL AS ENTITLES IT TO RELIEF.

The Fourteenth Amendment is intended to preserve rights and to secure equality of protection. The citizen is interested in results and is not concerned in methods. "**He is not bound to show affirmatively an intent to injure him.**" Taylor vs. L. & N., 88 Fed., 372. If other property has been intentionally under-valued or intentionally allowed a reduction of 33 per cent, it is entitled to relief if its property has been valued at its market value by officers who were not themselves guilty of any fraud. "The unjust operation of the assessment grows out of the systematic and intentional undervaluation of other species of property by assessors who are not responsible for the assessment complained of." L. & N. vs. Taylor, 88 Fed., 371.

An officer is bound to know that a general and intentional undervaluation of one class of property works an injustice on the owner of property assessed at full value.

Taylor vs. L. & N. R. R., 88 Fed., 372.

Although acting with perfect honesty, if the assessors or board of equalizers pursued methods calculated to bring about a substantial inequality in the taxable value of the properties here in question, as compared with other species of property in the State, the innocent intent in such a procedure would be no justification whatever, in law, for a wrong result. Full legal responsibility is recognized for the necessary, legitimate and natural result of acts, and a systematic course of procedure and an innocent mistake about the matter does not change the effect. For legal purposes, all persons are presumed conclusively to contemplate and intend the necessary and natural result of their acts. Agnew vs. U. S., 165 U. S., 36; 17 Sup. Ct., 235. If the board of equalization was under a duty to equalize, a mistaken view that such was not its duty could not change the law, and could not render a result legal which would otherwise be illegal.

R. R. & Tel. Cos. vs. Bd. of Equalizers, 85 Fed., 305.

The plaintiff was crushed in the toils of the "vicious circles" of the logicians. Evidence that the assessment was excessive was ignored because the assessment was conclusive. While it has been frequently held that the courts would not correct errors and mistakes in tax assessments, yet that rule has only been applied in cases where the assessment had issued after a full opportunity to be heard and assumed the proportions of a judgment.

But here, although there had ben no opportunity to be heard, the assessment was treated as conclusive, and all testimony showing that the stock had been systematically and independently assessed by 22 separate assessments at figures far in excess of its real value, were fruitless, and the testimony given no weight whatever. It was not a question of the sufficiency of the evidence, but it was not considered by the court, because there was no allegation of fraud and corruption.

Now, in these cases in which the most conclusive effect is given to the findings of the lower court, the rule is subject to the exception that this Court will consider whether proper evidence was excluded or improper evidence was admitted.

"We can not accept the contention of the Governmnet's counsel, because the jury was left to determine whether the pass was in fact navigable, and found the defendant guilty. The decision of the jury is binding upon the appellate court. We have a right to consider under what instructions and definitions the jury found their verdict."

Levoy va. U. S. 177 U. S., 628 (top.)

A slight paraphrase of the language in San Francisco Nat'l Bank vs. Dodge, 197 U. S., 87-8, is applicable, where the court in answering the contention that certain facts did not amount to discrimination, said:

"The fallacy underlying the whole contention cannot better be made clear than by the reiteration of the statement that under the facts as agreed, it is obvious that the shares of the Western of Alabama were assessed for all they were

worth under the rule of capitalization of net earnings, whilst the State railroads was only assessed 50 per cent, although the capitalization value would have required an assessment of nearly twice as much."

The Plaintiff comes within the protection of both clauses of the 14th Amendment. It has been singled out and then excessively taxed, without a hearing, though its omission was a result of reliance on the practice of the State's own officers, and the received construction of the State's own law and this Brief on this modern instance may appropriately conclude with an extract from the first American argument on Due Process of Law, by Dummer (1703), in reference to the forfeiture of the Charter of Massachusetts, where he said:

> "It seems, therefore, a severity, without a precedent, that the colony should, unsummoned and unheard, be deprived of all its valuable privileges * * * It is true the legislative power is absolute and unaccountable but the question here is not about **power**, but **right**. One may say that what the Parliament can't do justly, they can't do at all."

What was then an argument as to what ought to be the limitation on legislative power has now been crystallized in the 14th Amendment, which declares; that:

> "No State shall deprive any person of property with Due Process of Law, nor deny to any person within its jurisdiction the equal protection of the Law."

On that guarantee the Plaintiff relies,—to that promise it appeals.

JOS. B. CUMMING,

ALEX. C. KING,

JOSEPH R. LAMAR,

For the Georgia R. R. & Bk. Co.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

No. 89.

GEORGIA RAILROAD & BANKING COMPANY

vs.

WILLIAM A. WRIGHT, COMPTROLLER-GENERAL AND JOHN W. NELMS, SHERIFF.

IN ERROR TO SUPREME COURT OF THE STATE OF GEORGIA.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

The question involved in this case is the taxability in Georgia of fifteen thousand shares of stock of the Western Railway of Alabama, a foreign corporation, owned by appellant, a Georgia corporation. The stock has been adjudged taxable in Georgia by the highest court of that State. A writ of error has been filed by appellant to that judgment. The assignment of errors consists of seventeen in number, which may be reduced really to two questions, each resting upon the Four-

teenth Amendment of the Constitution of the United States. They may be stated:

First. A claim by appellant of the denial of the equal protection of the laws, and

Second. That its property is being taken without due process of law.

I.

DENIAL OF THE EQUAL PROTECTION OF THE LAW.

The denial of the equal protection of the law is based upon the claim that appellant is only one of two railroads in Georgia owning shares of stock in a foreign corporation against whom the tax is sought to be collected and, further, that the value placed upon the shares of stock in controversy for taxation is higher relatively than other property in the State of Georgia is taxed.

DENIAL OF DUE PROCESS OF LAW.

The claim that its property is taken without due process of law is based upon the ground the Georgia statute under which the Comptroller-General acted in assessing its property for taxation affords no notice and no opportunity to contest with the State the value of the property.

NO FEDERAL QUESTION INVOLVED.

It is the insistence of the appellee in the light of this record that no Federal question is now involved and that this court should dismiss the writ of error.

"In order to warrant the exercise by this court of jurisdiction over the judgments of State courts, there must be some fair ground for asserting the existence of a Federal question, and in the absence thereof a writ of error will be dismissed, although the claim of a Federal question was plainly set up; and where by the record it appears that such a claim, although set up, had no substance or foundation the fact that it was raised was not sufficient to give this court jurisdiction."

185 U. S., p. 336; N. O. Waterworks Co. *vs.* Louisiana.

There must be a real and substantial Federal question existing in order to give this court jurisdiction to review the judgment of a State court, and if the questions raised are so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature the writ will be dismissed. Whether, therefore, a Federal question is involved in the case so as to authorize this court to retain jurisdiction it must appear from the record that there is color of merit, and in the absence of such color the court will dismiss it. A reading of this record will disclose that the claim of a Federal question is clearly without color of foundation.

THE MERE ALLEGATION OF A FEDERAL QUESTION NOT SUFFICIENT.

"But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. 'Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision, or decisions, of this court as to leave no room for real controversy, the motion to dismiss will prevail.' "

Equitable Life Assurance Society *vs.* Brown, 187 U. S., p. 311; and cases there cited.

APPLICATION OF RULE.

Trying this case in view of the foregoing rule and in the light of the record it will be observed the claim of the denial of the equal protection of the law is unsupported by any evidence whatever. On the contrary, it is shown affirmatively by the evidence of the officer assessing the tax that he knows of

but one other citizen of Georgia owning shares of stock in foreign corporations and that he is proceeding to collect the tax from it on such shares. This issue was submitted to the judge who by agreement was authorized to try that question without the intervention of a jury, and who found that there was no discrimination as to persons in the levying of the tax and no inequality in fixing value as to property. This finding of fact was warranted, if not demanded, by the evidence and the verdict and judgment was approved by the Supreme Court of Georgia. (See printed record, page 57.)

"On error to a State court in a chancery case (as also in a case at law), when the facts are found by the court below this court is concluded by such finding."

Egan *vs.* Hart, 165 U. S. 188, citing

Dower *vs.* Richards, 151 U. S. 658, and cases therein referred to.

Bartlett *vs.* Lockwood, 160 U. S. 357.

Stanley *vs.* Schwalby, 162 U. S. 255, 278.

It does not appear from the record in the case that there is a single person in Georgia the owner of shares of stock in a foreign corporation from whom this tax is not demanded and collected, and it does affirmatively appear that the Comptroller-General, who is the head of the taxing department of this State, issued to the local receivers of tax returns instructions that "stock in foreign corporations held by citizens or corporations of this State should be returned for taxation in this State." (See record, page 69.)

THE CLAIM OF EXCESSIVE VALUE FOR TAXATION.

The record discloses that after hearing the evidence submitted the judge, trying the case by consent of counsel without

a jury found that "the evidence submitted does not show that the value of the stock placed thereon by the Comptroller-General is excessive." This property is taxed within the constitutional limitation, "All taxation must be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Costitution of Georgia, Art. 7, Sec. 7, Par. 1. (Civil Code, §5883.)

The questions, therefore, growing out of the first assignment of error, to wit, the claim of the denial of the equal protection of the laws, as to person and property, in the light of the record, is wholly unsupported. It is but a mere claim of a Federal question without the color of merit, and this court is consequently without jurisdiction.

II.

WANT OF DUE PROCESS.

The second assignment of error, that its property is taken without due process of law for the reason that the Georgia statute under which the Comptroller-General acted afforded no opportunity to appellant to contest with the State the value of its property for taxation, tried in the light of this record is equally without merit and raises no Federal question. This is a mixed question of law and fact and must be determined in the light of the law and the record.

NO FEDERAL QUESTION IN THIS ASSIGNMENT.

It is not denied that the appellant knew that it owned this property; that it was subject to taxation; that it had not been returned, and that it could have returned it at what it conceived to be its value, and if rejected and assessed by the Comptroller-General, the law provided machinery for the adjustment of the differences between the taxpayer and the State by a submission to arbitration.

KNOWINGLY AND WILFULLY REFUSED TO MAKE THE RETURN.

This is not a case where the appellant omitted ignorantly to return its property for taxation and an assessment by the Comptroller-General without notice to the appellant. Appellant not only neglected, but refused, to return the property in controversy for taxation, not because the Georgia law did not afford it an opportunity to contest its value, but for the reason urged that it was not subject to taxation under the laws of Georgia, and this, too, after a decision by this very court that the shares of stock *was* property and property subject to taxation under the laws of Georgia.

> Wright, Comptroller-General, *et al. vs.* Louisville & Nashville Railroad Co. *et al.*, 195 U. S., p. 219.

The executions in controversy were not issued until after the judgment of this court was rendered in the case of Wright

et al. vs. Louisville & Nashville R. R. Co. *et al,* supra, and issued then only after a refusal of appellant to return its property for taxation.

PARTY TO A FORMER SUIT.

It will be noted that this very appellant was an original party to the suit of Wright, Comptroller-General *et al. vs.* Louisville & Nashville R. R. Co. *et al.,* supra. It was made a codefendant with Wright, Comptroller-General, at the instance of the L. & N. R. R. and the Atlantic Coast Line Ry. Co., lessees of appellant, and jurisdiction of the case was acquired by the Federal Court upon the ground of diverse citizenship and the further allegation in the bill that the Georgia Railroad & Banking Company, the present appellant, *was about to return this stock in controversy to the Comptroller-General for taxation.* (See present record, p. —.) Appellant stood mute under these allegations, thereby making possible a long and expensive litigation, for only upon the idea of its being about to do these things would the Federal Court have retained jurisdiction.

APPELLANT OUGHT NOW TO BE ESTOPPED FROM RAISING THE QUESTION OF DENIAL OF DUE PROCESS OF LAW.

A litigant will not be heard on the claim of denial of due process of law in that he has had no opportunity to be heard on the value of his property for taxation when he refused and

neglects to do his duty by returning it for taxation, and when so returned the opportunity is given him by the statute of the State to be heard as to its value. He can not take advantage of his own wrong. By his wilful omission in this case appellant waived the right to a hearing as to the value of his property by refusing to return it for taxation. The burden of returning its property was on appellant, placed upon it by the Constitution and laws of the State, and ample machinery is provided for a hearing as to the value of its property had it been returned for taxation. Appellant's wilful refusal to return it for taxation is a waiver of the right to be heard as to value.

THE SUPREME COURT OF GEORGIA ADJUDGES APPELLANT IN DEFAULT.

The Georgia law as construed by its Supreme Court amply affords notice to the taxpayer and an opportunity to be heard as to value, provided he does his duty by first returning his property for taxation. The court holds further when he refused to return it, he is a defaulter and it becomes the duty of the taxing officer to assess it, which assessment shall be final. In other words, the Supreme Court of Georgia holds in this case, that appellant should have returned its property for taxation, that it had ample notice of its taxability, and that its omission to return it was wilful, and because of this omission the right to contest with the State the value of the property was waived.

"A person may by his acts, or omission to act, waive rights which he might otherwise have under the Constitution of the United States as well as under a statute, and the question of whether he has or has not lost such right by his failure to act, or by his omission, is not a Federal question."

Leonard *vs.* Vicksburg, etc., Railroad Co., 198 U. S. 416; citing

Eustis *vs.* Bolles, 150 U. S. 361;

Rutland Railroad Co. *vs.* Central Vermont Railroad Co. 159 U. S. 630.

THE LAW OF GEORGIA FURNISHED AN OPPORTUNITY TO BE HEARD.

"Whenever corporations, companies, persons, agencies, or institutions, are required by law to make returns of property or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller-General for taxation, such return shall contain an itemized statement of property, each class or species to be separately named and valued, or an itemized account of gross receipts, or business, or income, as above defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the Comptroller-General, and if in his judgment the property embraced therein is returned below its value, he shall assess the value within sixty days thereafter, from any information he can

obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned, as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall correct the same and assess the true amount, from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall receive notice, and shall have the privilege, within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators—one chosen by himself, and one chosen by the Comptroller-General—with power to choose an umpire in case of disagreement, and their award shall be final." §812 Code of Georgia of 1895, Vol. 1.

"In cases of failure to make return, the Comptroller-General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions." §813 Code of Georgia 1895, Vol. 1.

"Receivers and collectors are required to receive the returns and to collect the taxes thereon for former years, when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest." Political Code §855, Vol. 1.

"The Georgia law affords to every citizen, individual or corporation, ample facilities for the preservation of his rights as against the tax-gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the taxpayer will disclose to the officer all of his taxable property . . . . . the requirements of candor in disclosing the ownership of property is really at the foundation of our tax system. So long as the citizen complies with that requirement, he is afforded every opportunity

to dispute with the State the question of the value of his property and the amount of tax to be levied thereon. . . . In other words, ample machinery is available to the citizen who makes full returns; deprivation of the right to be further heard is one of the penalties visited upon the defaulter. The collecting officer must ascertain as best he can the amount of property to be taxed, as well as its value, and take summary means for its collection."

See Georgia Railroad Co. *vs.* Wright, 124 Ga. 617, citing

Cooley on Taxation, 619 to 624.

Board of Commissioners *vs.* Anderson, 68 Fed. 341.

Lott *vs.* Hubbard, 44 Ala. 593.

McMillan *vs.* Carter, 6 Mont. 215

Orena *vs.* Sherman, 61 Cal. 101.

Pittsburg Railroad Co. *vs.* Backus, 154 U. S. 426.

Hagar *vs.* The Reclamation District, 111 U. S. 701.

DuBignon *vs.* Brunswick, 106 Ga. 217.

APPELLANT REFUSED THE RIGHT TO BE HEARD.

The appellant was in position therefore to avail itself of all the rights and privileges it asserts have been unjustly denied. The door was wide open to the appellant, if it wished to litigate over value by making its return for taxation as was its duty under the law. Appellant should not be heard now to complain that the door is closed. That it is closed is not the fault of the law, but the act of appellant. The Fourteenth Amendment had not for its purpose the encouragement of persons in default, but the protection of person and property of those who were free from fault. A person can not disregard

the laws and invoke the Fourteenth Amendment to protect him in a right which he claims has been denied him when the observance of the law would have accomplished the very thing of which he complains. The Georgia law is plain and as construed by its Supreme Court affords an opportunity to be heard, provided the taxpayer does his duty. If he defaults it is a waiver of his right to be heard, and the Supreme Court of Georgia adjudged appellant in default and as having waived the right to be heard on values. This judgment is of itself sufficiently broad to sustain the judgment independently of the Federal question involved.

If, however, there be a Federal question involved, if the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, or upon some other independent ground sufficient of itself to sustain the judgment, this court will decline to further entertain jurisdiction of the case.

"To give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a Federal question was presented for decision to the State court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment, as rendered, could not have been given without deciding it." Where the record discloses that "If a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question not Federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Eustice *vs.* Boles, 150 U. S. 362.

THE FOURTEENTH AMENDMENT ENGRAFTS NO NEW PRINCIPLE INTO THE CONSTITUTION RELATIVE TO TAXATION.

"Although this court has never had occasion to determine exactly what the Fourteenth Amendment required in the assessment of ordinary annual taxes upon personal property such proceeding should be considered with the utmost liberality, and while notice need not be personal, but may be given by publication or by posting notices in public places. Such notices must be suitable and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared not to be due process of law."

Glidden *vs.* Harrington, 189 U. S. 255.

ARGUMENT.

The case of appellant is without merit and in the light of this record scarcely short of trifling with the law. This stock has been adjudged, both by this court and the Supreme Court of Georgia, as property subject to taxation under the laws of Georgia. The only semblance of merit to be found in this record is the claim of appellant that it acted under a misapprehension in not including this stock with the other property in its annual returns for taxation. Grant that the omission was the result of an honest mistake of law. This, however, can not be urged as a reason for a relinquishment of this property

from its liability to taxation. This omission was called to the attention of appellant by the taxing officers of the State and a request was made for a supplemental return. Even after the Supreme Court of the United States adjudged that this stock was subject to taxation the appellant refused, and up to this hour refuses, to offer to return it for taxation.

The claim of the denial of due process of law in that appellant has had no opportunity to contest with the State the value of the shares of stock in controversy will not in the light of this record appeal to this court. Appellant has never offered to return the shares of stock in controversy for taxation, and while it submitted to the taxing officer certain evidence as to the value of the property appellant has steadily, consistently and at all times studiously avoided returning the property or asking for the opportunity to now return it. Appellant did not wish to hear evidence as to the value of this property and in open court resisted an effort made to introduce evidence with the view of ascertaining the true value of the property. Notwithstanding the neglect to make a voluntary return of this property and appellant's attitude in moving to strike the offer extended at the trial of the case in open court to hear evidence as to value, the courts of Georgia did decide that they would hear evidence and in fact did hear evidence, and did find that the assessment was not excessive and that there had been no discrimination in the levy of the tax. There can, therefore, be no longer any valid reason urged why this tax should not now be collected. It may be inconvenient to appellant to pay the accumulated tax of several years in one lump sum, but it could not be urged as a hardship to require appellant to pay its just taxes.

It is respectfully submitted for these reasons that this writ of error should be dismissed.

JNO. C. HART,
Attorney for Appellee.

No. 89.

OCT 17 1907
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM 1907.

THE GEORGIA RAILROAD AND BANKING COMPANY,
Plaintiff in Error,
vs.
WILLIAM A. WRIGHT,
Comptroller-General of Georgia,
and
JOHN W. NELMS,
Sheriff of Fulton County, Georgia,
Defendants in Error.

In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT

—OF—

BOYKIN WRIGHT,
Solicitor for Defendants in Error.

INDEX--DIGEST.

Page.

STATEMENT OF THE CASE **1-3**

How it originated in State Court 1

Its purpose to enjoin collection of State tax on 15,000 shares of foreign Railroad stock held in Georgia 1-2

The taxes claimed were for years 1883 to 1904 2

A prior suit had been brought in U. S. Courts and a decision had of U. S. Supreme Court, holding said shares taxable in Georgia as plaintiff's property (195 U. S. 217) 2

After this decision Comptroller's demand for the taxes and the Railroad Company's refusal to pay 2

Then the executions were issued and the Railroad Company filed this suit to enjoin 3

The State Supreme Court decided adversely to Railroad Company on every point, except it applied the 7-year statute of limitation, as to all "back taxes" prior to 1895 3

Appeal by Railroad Company to this Court on two grounds: (1), want of due process in the law, and (2), denial of equal protection of the law 3

II.

RAILROAD COMPANY'S ASSIGNMENTS OF ERROR ARE AS FOLLOWS:

As to **WANT OF DUE PROCESS**, the specifications are 3-6

(1) Because no law giving Railroad Company right to be heard on "back taxes" 3

(2) Any law authorizing such assessment void because no provision for notice, and hearing 4

(3) Non-return of these shares was in good faith 4

(4) Universal practice not to tax foreign stock 4

(5) On the evidence the assessment was without notice 4

(6) Situs of stock not in Georgia 4-5

As to **DENIAL OF EQUAL PROTECTION** the specifications of error are 5-6

(1) **Railroad Company's** foreign shares taxed and others **not** 5

Page.

(2) **Railroad Company's** property taxed at or above market value and others at only two-thirds---------- 5

(3) **Railroad Company's** property taxed 75 per cent beyond its value and **others** below its value---------- 5-6

(4) Officers **knowingly** accepted and assessed property of **others** one-third **below,** and **Railroad Company's** at 75 per cent **above** its value ---------- 6

(5) Officers adopted method of ascertaining value by capitalizing net earnings at 6 per cent, but failed to reduce result by the one-third allowed other tax payers---------- 6

Why taxing statutes involved in this case set out in full here-- 6

III.

THE TAXING STATUTES OF GEORGIA ON WHICH THE STATE RELIES FOR ITS RIGHT TO ASSESS AND COLLECT THESE TAXES, AND WHICH ARE ASSAILED BY THE R. CO. AS NOT AFFORDING DUE PROCESS OF LAW 6-9

POLITICAL CODE SECTIONS:

Sec. 804. Returns to Comtroller, how made---------- 6

Sec. 805. Returns, when made, etc---------- 7

Sec. 812. Returns must be itemized and must contain what; tax receiver's duty; and tax payer's rights as to notice and hearing before arbitrators---------- 7

Sec. 813. When property not returned, the officer to assess------ 7

Sec. 814. Collection of tax, how enforced---------- 8

Sec. 847. Defaulters, failing to make returns in whole or in part penalized ---------- 8

Sec. 855. Taxes for former years, how returned and collected---- 8

Sec. 874. Execptons to be issued against defaulters---------- 8

Sec. 879. When no returns are made (as to all or only a part of property) the officer to assess property not returned-- 9

Sec. 949. Duty of officer to search for unreturned property and where found to assess for prior years as well as for current year---------- 9

Page.

The latest interpretation of the above statutes by the highest State Court is in the case at bar 9

IV.

BRIEF.

ON "DUE PROCESS OF LAW" 10-26

ON "EQUAL PROTECTION OF LAW" 27-39

I. DUE PROCESS.

DUE PROCESS OF LAW, in taxation; what it consists of 10

No specific definition of the term 10

Utmost liberality in applying the doctrine of "due Process" to tax proceedings 10-11

General Practice of collecting taxes in this country sufficient for due process 11

Elements of due process are **Notice** and **Opportunity** to defend 11

14th Amendment concerned only with **fundamental** rights 11

State tax procedure, to amount to a want of **due process** must be **spoliation** under guise of taxation 11-12

CHARACTER OF NOTICE:

Notice of suitable character and opportunity to be heard **once** at **some** stage, enough 12

Statutory notice, sufficient 12-13

Personal notice, not necessary 12

Tax Board has its time of sitting fixed by law. This is notice to all 12

The "process" of taxation does not require the same kind of notice as is required in ordinary suits or under power of eminent domain 13

CHARACTER OF HEARING.

Opportunity to be heard at **any stage,** enough 13

EXPARTE ASSESSMENT AS PENALTY FOR NON-RETURN

Opportunity once given to do so, failure or refusal to make a proper return to a designated officer in the manner and at the time required by law, may be penalized by withdrawal of further opportunity, without offending against due process of law. And no new notice required 13-16

Page.

The right to **"discriminate"** in some manner against those who fail to hand in lists has been often judicially recognized---------- 14

When the "discrimination" consists in merely submitting the party to the "doom of the Assessor," etc., no legal or constitutional objection to it---------- 14

When list of property and valuation thereof is required of the taxpayer, non-compliance is generally made a penal or criminal offense or subjects the tax payer to other punishment, such as withdrawal of rights to be further heard, etc., **"The constitutionality of such statutes is universally upheld by the courts."** 14-15

"If a person neglects or refuses to carry in his lists, he waives his right to be heard" further (see McTwiggan case and many citations at 14 and 15---------- 15

The statute of Georgia is rigid on this point. See case at bar (Trans. 180) ---------- 15

A CONTINUING NOTICE AND OPPORTUNITY:

The Georgia statutes (805 and 855) are a continuing notice and call to the defaulting tax payer to come in and make belated returns and be "heard" (see paragraphs 21 to 28)---------- 16

Under 855 the officer is compelled to "receive returns and to collect the taxes thereon for former years when any person is in default" ---------- 16

It is the **assessment** alone of omitted property that constitutes the judgment and closes the door for returns---------- 16-17

Not until the assessment of the "back taxes" is actually made (the judgment entered up) is the door, opened by Sec. 855, closed to the defaulting tax payer---------- 17

THE R. CO. A TAX DEFAULTER.

There is no question that the Railroad Company owned these shares and that they were in law taxable and ought to have been returned and that the statute called for the return of them and that the Railroad Company had not one, but many opportunities to make the returns and be heard, and failed and refused, when importuned to do so---------- 18

These are all closed questions—concluded by the decision of the highest court of the State in the case at bar---------- 18

The claim that it did not know they were taxable is worse than no excuse---------- 18

Good faith, no excuse---------- 18

Partial return, partial default---------- 18

The State will "hear" and "dispute with" taxpayer as to **property returned;** the officer exparte assesses property concealed, withheld or not returned---------- 18-19

The delinquent may return property omitted in prior years any time before actual assessment---------- 19

"SPENT FORCE" THEORY OF PLAINTIFF.

Page.
This doctrine cannot be applied to the Georgia tax system.....19-20

Also see Argument in this brief pp. 44-45

"Back taxes" must be returned and assessed..... 20

Such returns must be received by the officer and if not satisfactory, disposed of as provided in Sec. 812..... 20

"Acceptance" and "Assessment" by the officer of property actually returned no bar to property not returned..... 20

ACTUAL PAYMENT ALONE SATISFIES TAXES.

To pay taxes due in prior years is a continuing public duty.....31-22

"CURRENT YEAR" THEORY REJECTED.

The officer's duty is to assess for prior years as well..... 22

The principle upon which "back taxes" in the current or past years can be assessed at all without additional notice is that the tax payer is a **defaulter**—one who has had notice and opportunity and failed to avail himself of it.....22-23

THE DOCTRINE OF THE KUNTZ CASE REJECTED BY U. S. SUPREME COURT.....23-24

AFTER THE ACT OF 1884-5, p. 30, NO EXCUSE FOR RAILROAD COMPANY'S REFUSAL TO RETURN THESE SHARES.

The act of 1884-5 declared in so many words that foreign shares must be returned for taxation..... 24

The Railroad Company, to use the language of the Supreme Court of Georgia, "was bound to know that this stock was taxable and its misthken, though honest belief to the contrary, furnishes no excuse for nonpayment" 24

Failing to make the return, in the language of the same court, it **"then and there became a defaulter"**..... 24

Section 855 gave the Railroad Company the right to return and be heard even after being in default..... 24

Besides, before assessing these shares, the tax officers pleaded with the Railroad Company to make returns and it refused..... 24

Certainly no excuse for nonreturns after the decision of this court (195 U. S. 217) declaring these shares taxable..... 25

On this point see also this pamphlet.....52-55

THE CONSTRUCTION PLACED BY THE GEORGIA SUPREME COURT UPON THE GEORGIA STATUTES AND CONSTITUTION IS BINDING UPON THE SUPREME COURT OF THE U. S.

This principle has been repeatedly emphasized by the decisions of this Court.....25-26

Page.

2. DENIAL OF EQUAL PROTECTION OF THE LAW 27-39

This contention of Railroad Company depends upon the **facts** of the case—**the proof** 27-28

Hence the **law brief** and the **argument** or comment upon the evidence, will be treated together in this division 27

The Supreme Court of Georgia, in its decision in the case at bar aptly states the contention of the Railroad Company under this head as follows:

"That the tax officers applied the laws unequally against Railroad

(1) They taxed Railroad Company's foreign shares but not those of other tax payers.
(2 and 3) They taxed **Railroad Company's** property in excess of its value and **others at** one-third below its value.
(4) They taxed foreign but not domestic shares" 27

On each of these contentions the findings of the trial court were adverse to the Railroad Company and the Supreme Court on a full review of the testimony confirmed said findings of facts—holding that the record showed no discrimination against Railroad Company in the administration of the law..27-29, 30

Domestic stock not taxable under Georgia laws, say the Supreme Court; hence not to tax them and to tax foreign shares which are taxable under Georgia laws, constitutes no discrimination by the officers, say the Supreme Court 29

The findings of the trial judge on the facts has all the sanctity of a verdict of jury, say the Supreme Court and is never reversed if **any** evidence at all to support it 29

No discrimination by the tax officers, say the Supreme Court. Its review of the evidence 30-31

Verdict or finding not set aside unless totally unsupported by evidence, say the U. S. Supreme Court 31

"WHEN THE FACTS ARE FOUND BY THE STATE COURT, THE SUPREME COURT OF THE U. S. IS CONCLUDED BY SUCH FINDINGS."

This principle is stated in numerous decisions of this Court here cited 32

Tax tribunal's method of reaching its conclusion, not inquired into by Appellate Court 32

Unequal valuation by tax officers, nothing unless result of deliberate "scheme," says Justice Holmes, in case cited 32-33

THE TESTIMONY.

Page

The testimony sustaining the conclusions of the trial court and of the State Supreme Court, referred to.....33, 34, 35

The conclusion of the whole matter, as stated by the State Supreme Court 35

AFFIDAVITS OF FORTY TAX COLLECTORS FROM FORTY COUNTIES:

They are negative and vague..... 35
They established no intentional discrimination against Railroad Company 36

Of 145 counties only 40 heard from..... 36
No proof that a single share of foreign stock was held in one of the 40 counties..... 36

Comptroller General swore he knew of no other foreign shares than those assessed..... 36

"If there were other foreign shares the record does not show it," say the Supreme Court..... 36

"MARKET VALUE."

Some observation as to the market value of these shares.....36-37

BUT THE VERY ACTS OF ALLEGED DISCRIMINATION, NO VIOLATION OF THE 14th AMENDMENT, SAY THE SUPREME COURT OF U. S.....37-39

ARGUMENT.

ON DUE PROCESS..... 40-57

GEORGIA SYSTEM FULLY COMPLIES WITH REQUIREMENTS OF DUE PROCESS OF LAW.

What the 14th Amendment requires of State taxing laws is notice and opportunity once to be heard..... 40

This, the Georgia statutes, as construed by the highest State Court, fully complies with..... 40

Pol. Code, sections 804 and 805, provide the notice and summons... 40

Sec. 812 provides for tax payers returns and what they shall contain; also the tax officer's duty and the tax payer's rights and opportunity to be heard before arbitrators as to all property returned 40

Section 813 and its cognate sections (874, 879, 847, 949 and 855) provide, where no returns are made, for the officer to exparte assess 40

Omitted property subjected to "exparte assessment" or the "doom of the assessor"..... 41

Page.

On failure to make returns the law simply subjects the tax delinquent to the customary fate of the defaulter..... 41

The Georgia law affords the amplest **notice** and **opportunity** for hearing to every tax payer who complies with the law, say the Supreme Court..... 41

Tax returns for **former years** may be made by one in default up to the very time of an actual assessment..... 42

At each annual return on May 1st, the mandate is for returns for **prior** years as well as for current year..... 42

This call and opportunity remains open until actual assessment..42-43

For, say the Supreme Court:

"One who fails **today** to **give in** and pay taxes upon property not given in and paid in **former** years fails in a **present** duty"..... 43

This is the authoritative construction placed upon the statute by the highest Court of the State..... 43

Therefore **each year,** formally on May 1st, and **all the time** thereafter, until the assessment or the tax judgment is entered up, the defaulting tax payer may **make his returns and be heard**.. 43

In Georgia no tax penalties ever enforced where delinquent makes returns before actual assessment by the officer.....43-44

It is the **assessment** that constitutes the **quasi judgment that** closes the door to returns..... 44

The Railroad Company therefore had opportunity for making returns and being heard, from the initial year 1895 down to the time of final assessment..... 44

"SPENT FORCE."

This theory proceeds on the idea that when a process issues and the defendant in response comes into court and a judgment is reached on the subject matter of the suit the "force" of that process is "spent." Therefore, since the "omitted" or "unreturned" property was not included in the subject matter of that quasi tax suit, the "acceptance" of the return actually made is no bar to the returns which were **not** made..... 45

Besides, as to the unreturned property, there is a **new** and a **continuing** process (805 and 855) bidding the delinquent to bring in his delayed returns for prior years and be **heard** thereon..... 45

PROCESS TO BE BY LAW AND NOT BY FAVOR, SAYS RAILROAD COMPANY.

It has been demonstrated that the Railroad Company had **original,** annual, and continuing notice and summons, under the Statute. In addition **express** personal notice and summons was given. Railroad Company willfully rejected both..... 46

Page.

Hence the assessment could not be as claimed by Railroad Company "**unreasonable, arbitrary and unjust**" 46

RAILROAD COMPANY KNEW FROM THE STATUTE ITSELF, WHEN IT MADE ITS RETURNS, THAT OMITTED PROPERTY WOULD BE ADDED WHENEVER DISCOVERED 46

In concealing or omitting it, the Railroad Company took this risk **knowingly** and there could be no surprise even if actual notice had not been given 46

TAX PAYER'S ASSURANCE IN LEAVING THE TAX OFFICE.

The Railroad Company knew, under the Georgia statutes that in leaving the tax office after its **incomplete** returns were "accepted," it did so with the full understanding that the property omitted would be added and valued by the officer, if discovered 47

Therefore the Railroad Company was not denied a hearing but ran away from a hearing, which it could have had by simply returning the omitted property 47

A "hearing" is the very thing a tax dodger does not want for his unreturned property, for it is in silence and concealment alone that such property can enjoy immunity from taxation 48

"BACK TAXES" NOT PECULIAR TAXES, ENTITLED TO SPECIAL PRIVILEGES.

They are simply taxes which ought to have been paid long ago, but which have been **evaded** and successfully **dodged by** the defaulting tax payer, until run down by the tax officer 48

The fact that they are "back taxes" is no credit but a manifest discredit to the defaulting tax payer 48

But his very default is invoked by the Railroad Company to put him in a favored position and give him another day in court 48

He can not take a benefit from his own wrong 48

ADDING OMITTED PROPERTY CALLS FOR NEW AND PERSONAL NOTICE, SAY RAILROAD COMPANY'S COUNSEL.

The authorities cited, interpreted in the light of the Georgia statutes, do not sustain Railroad counsel's contention 49-50

Why the authorities cited can not apply to the Georgia statutes 50

The "exparte assessment" or the "assessors doom" is at the very **basis** of the Georgia system 50

The tax payer is therefore not taken by surprise when his omitted property is assessed. He has been made fully aware by the statute of what the result of his failure to make returns in whole or in part, will be 51

Page.

These observations distinguish the authorities cited from the case at bar---------- 51

The decisions cited by Railroad counsel on this point depend mainly upon the local statutes---------- 52

The very scheme of the Georgia tax law is to constrain the tax payer to make a complete return in the first instance and in default to penalize him by subjecting him to the "doom of the **assessor**"---------- 52

AFTER THE ACTS OF 1884-5, NO EXCUSE WHATEVER FOR RAILROAD COMPANY NOT TO MAKE RETURNS OF THESE SHARES ---------- 52

That act declared in so many words these shares must be returned for taxation----------52-53

The highest court of the State has so declared in the case at bar-- 53

Under Sec. 855 the Railroad Company had the privilege and opportunity and it was its duty to make the returns **at any time,** even after it was in default, clear down to the time of actual assessment in 1905---------- 53

R. CO. HAD NOT ONLY STATUTORY, BUT PERSONAL NOTICE.

The Railroad Company, though importuned by the tax officers to to make return of these shares before assessment, still refused.. 54

The Railroad Company formally refused and there was nothing left but for the officer to assess the unreturned shares as directed by the Statute from the best information he could procure---- 54

UNDER THESE CIRCUMSTANCES HOW IDLE TO CONTEND THAT THE ASSESSMENT BY THE COMPTROLLER WAS "UNREASONABLE, ARBITRARY AND OPPRESSIVE."---------- 54

The Comptroller General's considerateness and forbearance--------54-55

The Railroad Company's persistent and wilful refusal to comply with the law or the officer's demand, even after the decision of of the Supreme Court of the United States (195 U. S. 217) holding said shares taxable---------- 55

Its duty to make new or revised returns to include these shares after that decision by this Court, was plain---------- 55

This course has been evpressly pointed out in 70 Ga. 12 (h. n. 3)..55-56

THE UNITED STATES SUPREME COURT'S ATTITUDE TOWARD STATE TAXING LAWS.

So jealous of the State's legislation on the subject of raising its revenue has this Court been in the past, says Judson in his work on taxation, that **"in no cases has the Supreme Court of the United States declared the tax procedure of a State wanting in respect to the requisite notice and hearing, though numer-**

Page.

ous cases of alleged want of due process of law in assessment or collection of taxes have been presented." (see Judson, p. 379)-- 56

Again this Court declares on the same subject:

"But in order to bring taxation imposed by a State or under its authority within the scope of the 14th Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon **private rights** as to leave no doubt that such taxation by its necessary operation is really **spoliation** under the **guise** of **exerting the power to tax.**" 57

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 384.

THE GEORGIA RAILROAD & BANKING COMPANY, Plaintiff in Error, vs. WILLIAM A. WRIGHT, Comptroller General of Georgia, and JOHN W. NELMS, Sheriff of Fulton County, Defendants in Error.	In Error to the Supreme Court of the State of Georgia.

BRIEF AND ARGUMENT OF BOYKIN WRIGHT.

I.

STATEMENT OF THE CASE.

This cause originated in an equitable petition filed to the fall term 1905, of the Superior Court of Fulton County by The Georgia Railroad and Banking Company against William A. Wright, Comptroller General of Georgia, and the levying officer, John W. Nelms, Sheriff of Fulton County, in said State, to enjoin the enforcement by said Sheriff of executions

Origin of this suit.

issued by said Comptroller General for an amount claimed as taxes alleged to be due the State for the years 1883 to 1904, amounting to $125,974.00, on 15,000 shares of the capital stock of the Western Railway of Alabama (an Alabama corporation), held and owned by the petitioner as personal property in the State of Georgia. (See Transcript of Record, pages 18 to 34.)

The preceding suit.

In October, 1901, a Bill in Equity practically in behalf of the same party to enjoin the collection of taxes upon these very shares had been filed in the United States Circuit Court for the Northern District of Georgia by the present plaintiff's Lessees (the L. & N. and the A. C. L. R. R. Cos.) against William A. Wright, Comptroller General, and The Georgia Railroad and Banking Company. The Lessees were bound under terms of the lease to reimburse the Georgia Railroad Company for the tax if it had to be paid.

Decision therein by U. S. Supreme Court, holding this stock taxable.

In that case the Supreme Court of the United States (see Wright vs. R. R. Co., 195 U. S., 219) decided that these shares, though shares in a foreign corporation, held and owned in this State by the Georgia Railroad and Banking Company, were taxable as personal property to the owner in this State, and that it was the bounden duty of the Comptroller General under the Constitution and laws of Georgia to proceed to collect the same. Thereupon the Comptroller General brought this decision to the attention of the Railroad Company and made formal demand upon it for the payment of the taxes due on said shares from the time it became the owner thereof in 1883. The Company still refused to pay the said taxes or any part thereof, protesting notwithstanding the said decision of the United States Supreme Court that the said shares of stock in an Alabama corporation were not property, in Georgia, but mere symbols of property which was located elsewhere and not taxable in this State, and that there was no authority of law for the collection of the taxes demanded.

Thereupon Comptroller's demand for the tax and R. Co.'s refusal to pay and the assessment.

The Comptroller General thereupon assessed said shares and issued his executions, as aforesaid, and plaintiff filed its said equitable petition to enjoin the same.

Then petition in State Court to enjoin the enforcement of the tax.

In the suit brought, the assessment and collection of the tax were assailed on many grounds, all of which were decided adversely to the Railroad Company by the Supreme Court of the State, except the 7-year plea of the statute of limitation, which the Court applied to all taxes for years prior to 1895.

Decision of State Court adverse to R. Co.

Only two of these grounds are dealt with in the Assignments of Error in this case and can concern this Court, viz:

Appeal to U. S. Supreme Court on two grounds (a) want of due process in the law; (b) denial of equal protection of the law.

1. That the laws of Georgia under which the State seeks to impose and collect this tax, as interpreted by its highest Court, **do not afford due process of law**; and,

2. If the law be without reproach, its **adimnistration** by its taxing officers has been such as to **deny to this particular** plaintiff the **equal protection of the laws, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.**

The attack, as to want of due process of law, is directed mainly, if not exclusively, to the provisions of the State law dealing with the collection of taxes on property **omitted from the tax returns of prior years**; that is to say, those provisions dealing with **escaped taxes** and **tax defaulters.**

II.

ASSIGNMENTS OF ERROR.

1. Want of Due Process.

The specifications of the charge of a want of due process of law as set forth in the Assignments of Error, in brief, are: (Transcript, p. 5 to 8 and 9.)

Assignments of error specified. (1) No law giving R. Co. the right to be heard on "back taxes."

(1). In the **assessment** of **back taxes** on property omitted from prior returns, there was no law or statute of force in the

State of Georgia giving to the Railroad Company the right or opportunity to be heard as to its liability to said tax or as to the valuation of the stock;

(2) Any law authorizing assessment void because no provision made for notice and hearing.

(2) That the law of Georgia as contained in Sections 812, 813, 814, 847, 855, 874, 879 and 949 of Volume 1 of the Code of Georgia and the Acts of 1813, 1861 and 1804, in so far as they purport to authorize the assessment and valuation for taxation of property omitted from returns in prior years, is contrary to the Fourteenth Amendment of the Constitution of the United States in that said Sections and Acts fail to afford the tax-payer an opportunity to be heard on the question of the value of the property omitted from the tax returns of prior years;

(3) Non-return of these shares was in good faith.

(3) That it appears from the record that for the years 1895 to 1902 plaintiff **in good faith** made its returns for each of said years; that the stock of the Western Railway of Alabama, while **not returned,** was not omitted from said returns or either of them with intent to conceal the stock or to escape taxation, but because of the honest belief that it was not taxable, and that said returns were accepted by the Comptroller and that for him now, with out process of law and without the right or opportunity to be heard on the question of valuation, to assess and tax the same, would deprive plaintiff of its property without due process of law;

(4) Universal practice not to tax foreign stock.

(4) That by the universal **practice foreign** stock was treated as non-taxable and that a new construction of the law, and a new practice of the taxing department should not be given a retroactive effect, and that the assessment of taxes on said foreign stock for the years when the same was not treated or regarded as taxable without affording plaintiff the right and opportunity to be heard, is **unreasonable, arbitrary** and **unjust,** and takes from plaintiff its property without due process of law;

(5) On the evidence the assessment was without notice.

(5) That on the **evidence** in said case, made part of the record, said assessments were issued without process of law, without a hearing and without the opportunity to be heard on the question of value of said stock, and without notice of the **time** and **place** when said assessments would be made, and were, therefore, void because plaintiff was not given a day in Court;

(6) Situs of the stock not in Georgia as decided in 64 Ga., 783, and legislature, under 14th Amend-

(6) The Supreme Court of Georgia having decided that the decision of the Supreme Court rendered in the case of Wright vs. S. W. R. Co. (64 Ga., 783) was the law of the State until reversed by a full Bench, and that decision being to the effect that the situs of such stock was not in this State, it was not

competent for the Legislature, by a Legislative enactment, to undertake to fix the situs of said shares or to tax the same; and such an attempt at taxation was a taxation of property beyond the limits of the State of Georgia, and was contrary to the Constitution of the United States and to the Fourteenth Amendment thereof, and was the taking of property without due process of law.

ment not competent to change it.

2. Denial of Equal Protection:

The specifications of the charge that there has been a denial of the equal protection of the law, in brief, are: (Transcript 8 and 9.)

Plaintiff was denied "equal protection" because:

(1) The **pleadings** and **admissions of the defendants** show that the holder of no foreign stock had been taxed in Georgia except plaintiff and the C. of Ga. R. Co., who together own the entire stock of the Western Railway of Alabama. That the taxation of Plaintiff in Error on foreign stock for the years 1895 to 1902, and the failure to tax any other holder of foreign stock for the same period, is harmful discrimination against the petitioner in the administration of the law, and denies to the petitioner the equal protection of the laws, contrary to the privisions of the Fourteenth Amendment of the Constitution of the United States;

(1) **Its** foreign stock taxed and **others'** not.

(2) That the **Record** shows that all other property in the State is returned by the tax-payer at **two-thirds** of its market value and that such returns on such two-thirds valuation is **habitually, knowingly** and **intentionally** accepted by the taxing offiicers, and that when the assessments are made by the Comptroller General or State Board of Arbitration, he and they **hibitually, knowingly** and **intentionally** assessed such property for taxation at approximately two-thirds of its maket value, while the said Comptroller General having assessed petitioner's stock at the full capitalization value, made no reduction to equalize such valuation and assessment with the other property in the State; and that in assessing petitioner's stock without making a reduction allowed on other property, the Comptroller General discriminated against petitioner to its injury, and that such action on the part of the Comptroller, and the assessment consequent thereon, denied to plaintiff the equal protection of the law;

(2) Its property taxed at or above the market value and others at only two-thirds of the value.

(3) That the **Record** in said case shows that the other property of the State **is not assessed beyond its market value,** while the stock of plaintiff was assessed by the Comptroller General and taxed to plaintiff at least **seventy-five per cent**

(3) Plaintiff's property taxed 75 per cent beyond its value and others' below its value.

above its market value, whereby plaintiff was denied the equal protection of the law;

(4) Officers knowingly accepted and assessed property of others one-third below value and plaintiff's at 75 per cent above.

(4) That it appears from the **Record**, that the other property of the State is **habitually, knowingly** and **intentionally** accepted and assessed by taxing officers of the State at least **one-third below** its fair market value, while the shares of plaintiff were assessed and taxed for each of the years **seventy-five** per cent **above** its market value, whereby plaintiff was denied the epual protection of the law, etc.;

(5) Officers adopted method of ascertaining value by capitalizing net earnings at 6 per cent, but failed to reduce result by the one-third allowed other taxpayers.

(5) That it appears from the **Record**, that the Comptroller General in valuing and assessing railroad property for taxation adopted the method of capitalizing the net earnings of the Western Railway of Alabama for each and all of the years at 6 per cent, for the purpose of determining the value of the Western Railway of Alabama, and deducted the bonded indebtedness for the purpose of finding the value of the stock; yet, after finding the value of the stock by such method, the Comptroller General made no reduction of the one-third or any other sum from the valuation thus found, but assessed such stock at such valuation thus found without any deduction whatever; that in so doing the Comptroller General **knowingly** and **intentionally** discriminated against plaintiff, and in the **administration** of the laws, denied petitioner the equal protection, etc.

Reason for here setting out in full the taxing statutes in question.

For a better understanding of the issues thus raised we here reproduce at the outset the statutes in full, relied upon by the State as authorizing the assessment and collection of these taxes, and assailed by the Railroad Company, as **not affording due process of law.**

III.

THE TAXING STATUTES OF GEORGIA ON WHICH THE STATE RELIES FOR ITS RIGHT TO ASSESS AND COLLECT THESE TAXES AND WHICH ARE ASSAILED BY THE RAILROAD COMPANY AS NOT AFFORDING DUE PROCESS OF LAW.

The Georgia taxing statutes involved in the case at bar. §804.

These statutes are contained in Political Code of 1895, as follows:

"**Section 804. Returns to Comptroller, How Made.** The returns of all companies or persons required to be made to the Comptrolled General must be in **writing** and **sworn to**, by the presiding officer," etc.

804 Pol. Code.

§805. The process.

"**Section 805. Returns and Taxes, Etc.** The returns of all railroad and insurance and express companies, and agents of foreign companies, authorized in this State, shall be made to the Comptroller General by the **first day of May** in each year, and the taxes thereof paid to the State Treasurer by the first day of October, and not later than December twentieth, of each year."

Sec. 805 Political Code.

§812. The returns, what must contain.

Section 812. Returns to Comptroller Must be Itemized. Whenever corporations, companies, persons, agencies, or institutions, are required by law to make returns of property, or gross receipts, or business, or income, gross, annual, net, or any other kind, or any other return, to the Comptroller General, for taxation, such return shall contain an **itemized statement of property,** each class or species to be separately named **and valued,** or an itemized account of gross receipts, or business, or income, as above defined, or other matters required to be returned, and in case of net income only, an itemized account of gross receipts and expenditures, to show how the income returned is ascertained, and such returns shall be carefully scrutinized by the Comptroller General, and if in his judgment the property embraced therein is returned **below its value,** he shall assess the value, within sixty days thereafter, from any information he can obtain, and if he shall find a return of gross receipts, or business, or income, as above defined, or other matters required to be returned as aforesaid, below the true amount, or false in any particular, or in anywise contrary to law, he shall **correct the same and assess the true amount,** from the best information at his command, within sixty days. In all cases of assessment, or of correction of returns, as herein provided, the officer or person making such returns shall **receive notice and shall have the privilege within twenty days after such notice, to refer the question of true value or amount, as the case may be, to arbitrators**—one chosen by himself and one chosen by the Comptroller General—with power to choose an umpire in case of disagreement, and their award shall be final."

Must be carefully scrutinized by Comptroller.

If returned below its value, what he must do; and what taxpayer must do.

If officer and tax-payer disagree, arbitrators provided for as a tax Court.

Political code 1895, Sec. 812.

§813. If no returns, the officer assesses.

"**Section 813. When No Return, Comptroller to Assess.** In cases of failure to make return, the Comptroller General shall make an assessment from the best information he can procure, which assessment shall be conclusive upon said corporations, companies, persons, agencies, or institutions."

Sec. 813.

§814. Collection, how enforced.

"Section 814. Collection of Tax, How Enforced. In all cases of default of payment of taxes upon returns or assessments, the Comptroller General shall enforce collections in the manner now provided by law."

Sec. 814.

§847. Failure to return, in **whole** or **in part**, penalized.

"Section 847. Defaulters to be Doubly Taxed. If a person fails to make a return, **in whole or in part,** or fails to **affix a value to his property,** it is the duty of the receiver to make the valuation and assess the taxation thereon, and in all other respects to make the return for the defaulting person from the best information he can obtain, and having done so, he shall double the tax in the last column of the digest against such defaulters, after having placed the proper market value or specific return in the proper column; and for every year's default the defaulter shall be taxed double until a return is made."

Sec. 847.

§855. Taxes for former years, though in default, may be returned.

"Section **855. Taxes for Former Years, How Returned and Collected.** Receivers and collectors are required to **receive** the returns and to collect the taxes thereon for former years, when any person **is in default,** which taxes shall be **assessed** according to the law in force at the time the default occurred, and shall be so specified in the digest."

Sec. 855.

§874. Executions to be issued against defaulters.

Section 874. Defaulting Corporations. If any corporations, company, person, agency, or institution, who are required to make returns to the Comptroller General shall **fail to return** the taxable property or specifics, or pay annually the taxes for which they are liable to the State Treasury, the Comptroller General shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties."

Sec. 874.

§879. When no return (as to all

"Section 879. When There is No Return. When there is no return by which to assess the tax, the Comptroller

General shall, from the best information he can procure, assess in his discretion."

or a part of property) the officer to assess.

Sec. 879.

Section 949. Collector's Duties Enumerated. It is the duty of tax collectors * * *

§949. Duty of officer to search for unreturned property and to assess the same for prior years.

"(2) To search and ascertain as far as possible all polls and professions, and all **taxable property** not returned to the receiver or not found in his digests.

"(11) To issue executions against all tax defaulters who are residents of the counties in which said tax collectors are holding their offices, for any and every year **preceding and including** the years for which they are elected, and to **collect the tax due from said defaulters,** and pay over the same to the proper authorities."

Sec. 949.

For the latest interpretation of these statutes by the highest Court of the State, see the decision of the Supreme Court of Georgia, in the case at bar.

The latest interpretation of the above statutes is in the case at bar.

Transcript of Record, 176 to 180, or 124 Ga., 613, 618.

That Court says: "In our opinion the only rational construction to be placed on Sections 813 and 874 of the Political Code is that they cover as well a **partial** as a **total** failure to make returns."

These laws apply to partial as well as total failures to return.

Trans. 178, or 124 Ga. 614.

That Court construes the words "Receivers and Collectors" in Section **855** and wherever used in the taxing statutes to include the Comptroller General, who, under the law, is the **Receiver** and **Collector** of the taxes of Railroad Companies.

The "Comptroller" is included in the terms "Receiver and Collector."

Trans. 178-179, or 124 Ga. 616.

IV.

BRIEF

DUE PROCESS.

1

Due Process of Law in Taxation; What it Consists of:

"Due Process" in tax procedure very different from judicial process.

Though the task of defining due process has been frequently essayed by other Courts, the Supreme Court of the United States has refused to limit or qualify the phrase by specific definition; holding that what was or was not due process is a matter for decision by concrete and practical application of the doctrine to each particular state of facts and not by general definition.

Glidden vs. Harrington, 189 U. S., 255; L. Ed. 798

2

No specific definition of the term.

In the above stated case the Court says:

"Although with respect to this class of taxes, we have never had occasion to determine exactly what the Fourteenth Amendment required, we have held **that the proceedings should be construed with the utmost liberality** and while a **notice** may be required at some stage of the proceedings, such notice need not be personal, but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are **suitable** in a given case, and it is only where the proceedings are **arbitrary, oppressive** or **unjust** that they are declared to be not due process of law."

Utmost liberality in applying the doctrine of due process to tax proceedings.

189 U. S., 255;

Citing, Davidson vs. New Orleans, 96 U. S.; L. Ed. 616;
Hagar vs. Reclamation District, 111 U. S., 201; L. Ed. 569;
Paulsen vs. Portland, 149 U. S., 30; L. Ed. 637;
Pittsburg, etc., Co., vs. Backus, 154 U. S., 42; L. Ed. 103;
Allen vs. Ga., 166 U. S., 138; L. Ed. 949;
King vs. Portland, 184 U. S., 61; L. Ed. 451;
Simon vs. Craft, 182 U. S., 421; L. Ed. 1165;

Turpin vs. Lemon, 187 U. S., 51; L. Ed. 74;
Also, Kelly vs. Pittsburgh, 104 U. S., 78; L. Ed. 658.

3

"The general system of procedure for the levy and collection of taxes established in this country is within the meaning of the Constitution, due process of law."

The general system for collecting taxes in this country sufficient for due process.

Kelly vs. Pittsburgh, 104 U. S.; 78; L. Ed. 658.

4

In Turpin vs. Lemon, 187 U. S., 51, Justice Brown says:

"But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the **utmost liberality**, sometimes even to the extent of holding that no notice whatever is necessary."

As applied to tax laws utmost liberality observed.

187 U. S., 51 at 58 (L. Ed.) at 74.

5

Elements of Due Process:

"The esssenial elements of due process are **notice** and **opportunity to defend.** In determining whether such rights were denied, we are governed by the **substance** of things and not by the mere form."

Elements of due process Notice and Opportunity to defend.

Simon vs. Craft, 102 U. S., 421 (L. Ed.) 1165.

6

"The Fourteenth Amendment has to do solely with the **fundamental rights** and is not concerned with the mode of procedure or remedy by which such rights be asserted."

14th Amendment is concerned only with **fundamental** rights.

L. & N. R. R. Co. vs. Schmidt, 177 U. S., 230 (L. Ed.) 747.

7

State Taxation, to be Wanting in "Due Process," Must be Spoliation Under the Guise of Taxation:

"In order to bring taxation by a State or under its authority,

To amount to want of due process must be **spoliation** under guise of taxation.

within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."

Henderson Bridge Co., vs. Henderson, 173 U. S., 592 at 615 (L. Ed.) 823 at 831.

8

Notice and Hearing the essentials.

Notice and Hearing, the Essential Requirements:

"Due process in matters of taxation means notice of suitable character, and an opportunity to be heard at some stage of the proceedings."

Taylor vs. Secor (State R. R. Tax Cases 111) 92 U. S., 575 (L. Ed.) 663;
Ky. Tax Case, 115 U. S., 321 (L. Ed.) 414.

9

Statutory notice enough.

Character of Notice:

The notice need not be personal or individual. In fact, the usual and proper notice is statutory and collective:

"Statute which names the time and place for meeting of the assessing board, is sufficient notice in tax proceedings, personal notice to the tax-payer is unnecessary."

Pittsburgh vs. Backus, 154 U. S., 421 (L. Ed.) 1031;
Judson on Taxation, Section 321, 329.
Ky. Tav Cases, 115 U. S., 321 (L. Ed.) 414.

10

"The Board has its time of sitting fixed by law. The sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked."

Taylor vs. Secor, 92 U. S., 575 (L. Ed.) at 672.

11

"The process of taxation does not require the same kind of

notice as is required in a suit at law, or even proceedings for taking private property under the power of eminent domain. It involves no violation of the process of law when it is executed according to the customary forms and established usages, etc."

Due process met, if according to "customary forms and established usages."

Bell's Gap, etc., Co. vs. Pa., 134 U. S., 232 (L. Ed.) 892.

12

"It has been repeatedly decided by this Court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial; and that due process of law as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given and that has been held sufficient."

Statutory Notice generally the only given or required.

Ky Cases, 115 U. S., 321 (L. Ed.) 414.

13.

Character of Hearing:

Opportunity to be heard at some stage of the proceedings is all that is requisite. It may be either before or after the assessment or at any time before final judgment is entered.

If opportunity to be heard at any stage, enough.

Gallup vs. Schmidt, 183 U. S., 300 (L. Ed.) 407;
Walker vs. Sauvinet, 92 U. S., 90 (L. Ed.) 678;
Davidson vs. New Orleans, 96 U. S., 97 (L. Ed.) 616.
Spencer vs. Merchant, 125 U. S., 345 (L. Ed.) 763;
Pittsburgh, etc., vs. Backus, 154 U. S., 421 (L. Ed.) 1031.

14

Ex Parte Assessment as Penalty for Non-Return:

It is no denial of due process to withdraw the opportunity to be heard as a penalty for the taxpayer's failure or refusal to make a proper return of his property to a designated officer, in the manner and at the time required by law.

Exparte assessment as a penalty for non-return.

Glidden vs. Harrington, 189 U. S., 255 at 259, 260 (L. Ed.) 798 at 801, 802.

15

In the above case the Court says:

"Defendant did not choose to comply with that notice by submitting a list of property held by him * * * Upon his failure to make his returns the Assessors did the only thing they could do: ascertain as nearly as possible the particulars of the personal estate and estimate it at what they believed its just value."

Ib 189 U. S., at 259 and 260 (L. Ed.) 801, 802.

16

The right to penalize those who fail to make returns recognized.

"The right to discriminate in some manner against those who fail to hand in lists has often been judicially recognized. When the discrimination consists in merely submitting the party to the 'doom' of the assessor and depriving him of any appeal, it would seem that there could be no valid objection to it."

Such delinquents are properly submitted to the "doom of the Assessor."

Cooley on Taxation (3d Ed.) 619 to 624 and notes;
Board of Commissioners vs. Anderson, 68 Fed., Rep., 341;
Lott vs. Hubbard, 44 Ala., 493;
State vs. Louisiana, 19 La. Ann., 474;
Railway Co. vs. Johnson, 108 Ill., 11;
Morris vs. Jones, 150 Ill., 542; 37 N. E. R., 929;
McMillan vs. Carter, 6 Mont., 215; 9 Pac., 906;
Valencia County vs. R. R. Co., 3 N. M., 380; 10 Pac., 294;
Orena vs. Sherman, 61 Cal., 101;
Tucker vs. Aiken, 7 N. H., 113;
Hartford vs. Champion, 58 Conn., 268; 20 Atlantic, 471;
State vs. County Commissioner, 5 Nev., 317;
McTwiggan vs. Hunter, (R. I.) 29 L. R. A., 526;
Tripp vs. Torrey, 17 R. I., 359;
Grigsby, etc., vs Freeman (Va.) 58 L. R. A., 349;
Georgia, etc., vs. Wright, 124 Ga., 617 and citations (Trans. 180).

17

In 27 Am. & Eng. Ency. (2d Ed.) at 669, it is said:

This is no violation of "due process."

"The revenue laws usually require persons liable to taxation to make out and furnish the assessing officer a statement containing a list of all his taxable property, and, in some jurisdictions, an estimate of its value. Non-compliance with the statutory requirement, or a false and fraudulent return is

generally made a penal or criminal offense, or subjects the tax-payer to other punishment, such as a withdrawal of his right to have the assessment reviewed, or an arbitrary addition to the amount of the tax. The constitutionality of such statutes is universally upheld by the Courts."

All courts uphold the constitutionality of such statutes.

27 Am. & Eng. Ency. (2d Ed.) 669;
Citing, Board of Revenue vs. Montgomery, etc., 64 Ala., 269;
Siegfried vs. Raymond, 190 Ill., 424;
State vs. Halter, 149 Ind., 292; 47 N. E. R., 665;
Marion County vs. Kneidenier, 72 La., 92; 33 N. W. R., 378;
Peacock, etc., vs. Com. (Ky.) 62 S. W. R., 272;
Bank vs. New Bedford, 155 Mass., 313; 29 N. E. R., 532 and many others.

27 Ency. L. (2d Ed.) 669.

18

In McTwiggan vs. Hunter, supra, it is said:

"If a person liable to be taxed neglects or refuses to carry in his list, he waives his right to be heard, and under Section 8, if overtaxed he is without a remedy. We do not see that this procedure is in any way repugnant to the Constitution of the United States * * * We do not think the assessment was invalid for want of notice."

Ib. 29 L. R. A., 526.

So ruled in McTwiggan case, here cited

19

The statute of Georgia is rigid on this point. In the case at bar the Court says:

"It (the Georgia Law) presupposes that the tax-payer will disclose to the officer all of his property, and it requires him to know whether his property is taxable or not. Th erequirement of candor in disclosing the ownership of property is really the foundation of our tax system * * * Deprivation of the right to be further heard is one of the penalties visited upon the defaulter."

So ruled in case at bar, here cited.

Georgia, etc., vs. Wright, 124 Ga., 617 (Trans. 180);
Political Code, Secs. 813, 874, 879.

20

In Morris vs. Jones, supra, the Court says as to omitted property:

And many other cases.

"It was their duty to return * * * Failing to do so it was not only the right but the duty of the assessor to place it on the schedule, and assess it, and he was not **required to give any notice** whatsoever of his action in that regard."

Morris vs. Jones, 150 Ill., 542; 37 N. E. R., 929;
Railway Co. vs. Johnson, 108 Ill., 11.

21

A Continuing Notice: A Continuing Opportunity Until Actual Assessment:

The Georgia statutes constitute a continuing notice and call to make returns.

The statutes in question (Sections 805 and 855) are a continuing Notice and Call to the tax-payer to come in and make his returns and "to be heard"—"dispute with the State."

Each year, and **all the time**, until **actual assessment**, this invitation and call to duty is pressed upon the tax-payer.

He has only to **make his return**, in order to be "heard" and to "dispute with the State" the question of the value of his property and the amount to be levied thereon.

Political Code, Sec. 855;
43 Ga., 551, 2;
124 Ga., 616 (Trans. 178, 9);
70 Ga., 12 h. n. 3 and at 23, 4.

22

Under 855 Comptroller compelled to **receive returns** for "back taxes" if offered.

Under Section 855 the officer is compelled "to receive returns and to collect the taxes thereon for former years when any person is in default."

Sec. 855;
See, also, Secs, 847, 949 (2) (11).

23

The same Section (855) compels the officer, after receiving said returns of the defaulting taxpayer to **assess** the omitted property "according to the law in force at the time the default occurred;" that is to say, if the returns made are unsatisfactory he must give the taxpayer notice and an opportunity to **arbitrate**, as directed by Section 812 in case of **returns.**

Political Code, Secs 855, 812;
124 Ga., 615, 616 (Trans. 178, 179).

24

Assessment, a Quasi Judgment.

Assessment is quasi judgment.

An **assessment** of omitted property is the quasi **tax judgment**

that adjudges the delinquent tax-payer to be an actual defaulter.

See 62 Ga., 504.

25

In the language of the Supreme Court in the above case:

Ditto.

"It was the assessment of the taxes made by the Comptroller General * * * that was the foundation of the tax fi. fas. issued against the defendant; that was the judgment, so to speak, upon which the fi. fas. were based; the return of the defendant * * * might have remained in the Comptroller General's office for an indefinite period of time without pecuniary detriment, but for the **assessment** made on that return," etc.

Goldsmith, etc., vs. Southwestern R. R. Co., 62 Ga., at 504.

26

Not until that assessment is made or quasi judgment entered is the door, opened by section 855, closed to the tax-payer.

27

Door of opportunity not closed to the defaulter until the assessment is actually made.

The above view is not in conflict with the language either of Mr. Justice Candler, 124 Ga., 617 (Trans. 180) or of Mr. Justice Cobb (Trans. 161) to the effect that the door of opportunity was closed to the "defaulter"—that is to say, to one who has been or is then **being adjudged to be a defaulter.** Otherwise the contention insisted upon by the Railroad Company would annul Section 855, which was so specifically accentuated and applied by the Supreme Court in the case at bar.

See 124 Ga., at 615 and 616 (Trans. 178, 179).

A contrary view would also be in conflict with the main principle of this decision, interpreting Section 855.

See 124 Ga., 615, 616 (Trans. 178-179).

See "Argument" page — of this Brief.

28

The Railroad Company a Tax Defaulter:

R. Co a defaulter.

There is no question that the Railroad Company owned the property; none that it omitted to return it; none that the

No dispute that R. Co. owned the property and omitted to return it and knew it was taxable and had opportunity to return and be heard.

property was taxable and should have been returned; none that it was given an opportunity to return it and to be heard; and none that its failure to make the return placed it in default; and none that if the railroad Company had made the return required, **at any time** before **actual assessment,,** full opportunity of a hearing was still assured, notwithstanding its default. These are all closed questions—concluded by the Supreme Court of Georgia in the case at bar.

124 Ga., 615, 616 and 617 (Trans. 180);
Political Code, Secs. 855, 812.

29

Good Faith No Excuse for Non-Return:

The maxim, "ignorantia legis neminem excusat" rigidly enforced in Georgia.

"In no jurisdiction has the maxim **ignorantia legis neminem excusat** been more rigidly employed than in Georgia. The Railroad Company was bound to know that this stock was taxable, and its mistaken, though honest belief, to the contrary, furnishes no excuse."

124 Ga., at 614 (Trans. 177).

30

A Partial Return is a Partial Default:

"When he fails to return, in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter."

124 Ga., 617 (Trans. 180) Sec. 847, Political Code.

"No return" is the status of property omitted or withheld from the returns.

"The sections of the Political Code which prescribe the steps to be taken by the Comptroller General in the event of the failure of individuals or corporations to make returns for taxation are not restricted to cases where no return whatever is made, but apply equally to cases **where property owned by the citizen and subject to taxation IS WITHHELD** from the return."

124 Ga., 598 h. n. 9 and at 614 (Trans. 178).
Secs. 813, 814, 874, 879, 847, 855.

31

In other words, if the tax-payer will do his duty and return his property fully and fairly, the State will arbitrate fairly

and fully under Section 812, as to valuation or amount. It will not, however, "dispute" with him as to whether he will obey the law, and make a return. He must do that in compliance with the mandate of the statute, and if he fails there is but one thing to do, viz., assess him. No method is provided for compelling the delinquent to pay taxes on omitted property except an ex parte assessment.

The State will not "hear" and "dispute" with tax-payer as to property returned. The officer can ex parte assess property not returned.

32

But Even the Delinquent May Repent:

As we have seen at any time after his original failure to return his property and before he has been penalized by an assessment, the delinquent may atone by a tardy performance of his duty. Any and every year since these taxes first fell due, the Railroad had a right to return them for taxation. It is made the duty of the officer "to receive the returns." After such reception no change can be made in valuation except under the provisions of Section 812, providing for notice of any change and an opportunity to arbitrate.

The delinquent may return property omitted in prior years any time before actual assessment.

See Sections 812, 855, 847, 949;
124 Ga., 616 and 617 (Trans. 179, 180),
43 Ga., 551, 552.

33

In Walker vs. Whitehead, 43 Ga., 551, approvingly quoted in the case at bar in 124 Ga., 616, the Court says:

"Section 855 provides how taxes for previous years shall be given in and paid, and one who today fails to give in and pay taxes upon property not given in and paid in former years, fails in a present duty," etc.

124 Ga., 616 (Trans. 179);
70 Ga., 12 h. n. 3 and at 23 and 24.

34

The "Spent Force" Theory of Plaintiffs:

The above completely answers the contention of the plaintiff that after a return has been made and accepted, final judgment is reached and the original process becomes a spent force.

"Spent force" theory can't apply to the Georgia system.

124 Ga., 615 (Trans. 179, Sec. 855.

As to items **actually returned** the tax-pays' return does become final unless the Comptroller appeals therefrom in the manner and within the time prescribed by Section 812. As to the items **unreturned** or **omitted**, there has been no subject matter for a judgment. As to these he has simply **defaulted** and has made no returns.

124 Ga., 598 h. n. 9 and at 614 (Trans. 178);
27 Am. & Eng. Ency, (2d Ed.) 701.
See Argument at pages 44 and 45 of this Brief.

35

Sections 805 and 855:

"Back taxes" must be returned and assessed.

In the case at bar the **statutes** furnish the process. Each year and all the time until actual assessment this invitation and call for returns is pressed upon the tax-payer. Every time the tax-payer makes a return he is just as much bound under the above sections to give in property subject to taxes in **former years** as that subject during the current year, and his failure in either respect is penalized.

Such returns must be received and if not satisfactory, disposed of as provided for in §812.

See authorities cited above. 43 Ga., 551-2 and 124 Ga., 616.

Every return that is made to the Comptroller, whether it be for taxes due now or in the past, must be accepted by him as final, unless he chooses to comply with Section 812 and submit the matter to arbitration.

See authorities above cited.

36

Assessment No Bar.

Acceptance of returns actually made and assessment thereon no bar as to property not included in returns.

"An assessment is not a judgment within the doctrine of **res judicata**, and does not bar or estop a **supplemental assessment** of property which was, in fact, erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, **holding it to be exempt.**"

27 Am. & Eng. Ency. (2d Ed.) 701;
Sturgis vs. Carter, 114 U. S., 518;
124 Ga., 615 (Trans. 178).

37

"Acceptance" of Returns No Bar:

"Whatever may be the binding effect of the acceptance of

returns by the tax officer in a matter involving **judicial action** it cannot be claimed that the ascertainment whether the returns **accepted** embrace **all the property owned by the citizen is a judicial act.** The fallacy of the 'closed book' theory is shown, we think, by Section 855."

124 Ga., 615 (Trans. 178).

38

Actual Payment Alone Satisfies Taxes:

"The obligation of the citizen to pay his taxes is regarded as a **continuing public** duty, which is discharged only by their payment * * * The rule is universal that in the absence of provision, statutes of limitation do not run against the State, for the reason that laches cannot be imputed to it, and its rights cannot be prejudiced **by neglect of its officers."**

To pay taxes due in prior years is a continuing public duty, discharged only by payment.

27 Am. & Eng. Ency. 788;
Stone Co. vs Whitehead, 152 Ind., 474; 57 N. E. R., 947.
Dubignon Case, 106 Ga., 317 and 326;
43 Ga., 551.
Florida, & C. R. Co. v. Reynolds, 183 U. S., 471, at 475. L. Ed. 285.

39

In the Dubignon case, 106 Ga., at 319, it appears that in the year 1894 and for each year thereafter, including the years 1895, 1896, 1897 and 1898, said Oglethorpe Hotel property escaped taxes for the reason "that John E. Dubignon, the owner thereof, laboring, he claims, under the impression that the term for which said property had been released from taxes had not expired, **failed to make return** of the same and appeal from the valuation fixed by the Board of Assessors to a Board of Arbiters, as provided for; and that during said years up to 1898, the Clerk of Council, laboring under a like impression, failed to issue executions against said property for the taxes due thereon. In 1898 the present Mayor and Council of the City of Brunswick, ascertaining that said property was in arrears for the taxes due theron for said years, had the Clerk of Council to issue executions therefor and caused the same to be placed in the hands of the marshal for collection and said property levied on and advertised for sale."

The Dubignon case, 106-319.

106 Ga., at 319.

The Supreme Court of Georgia, passing upon the above case, says:

"Back taxes" in Georgia can be collected.

"It should be observed that no time is fixed from and after the first day of May of each year within the limit of which this power can be exercised. Surely it will not be seriously contended that where there is a failure in any one fiscal year to exercise this power to issue executions and levy and sell thereunder for the purpose of collecting **back taxes**, that not only is the right to do so lost, but * * * that therefore the city must lose all back taxes due and unpaid for preceding years * * * The Court is overwhelmingly convinced and constrained to hold that such is not the law."

106 Ga., at 326.

No vested rights in false returns.

"Tax-payer has no vested rights in the fruits of false returns."

Sturgis vs. Carter, 114 U. S., 511.

40

"Current Year" Theory Rejected:

The officer's duty to assess for **prior** years, under the statutes.

In the case at bar the Supreme Court of Georgia demolished plaintiff's theory that Sections 813, 879, etc., of the Code authorized the officer to assess property omitted only for the **current year.** On the contrary, that Court held that the Georgia law required the officer to assess property **omitted for prior years** as well, and to go back the full limit of the seven years statute of limitation.

124 Ga., 613 to 618.

The principle upon which "back taxes" are assessed without a second notice is that he is a defaulter, etc.

The **principle** upon which the assessment in **either** case could be made without additional notice is that the tax-payer is in **default,** that is to say, he had already had notice and an opportunity to be heard as to the omitted property and failed to avail himself of it. He had had his day in Court and neglected it. He was, in short, a defaulter.

If the failure to make returns for the current year places the tax-payer in default and subjects him to an ex parte assessment, **without offending the law of due process,** how much more aggravated his default where it is persisted in for one or more years. If a defaulter in the first year, he is doubly a defaulter for each succeeding year he remains in default; for,

"Payment alone satisfies the State's demand for taxes. The duty to pay is continuing:

Walker Case, 43 Ga., 551, 2:
Dubignon Case, 106 Ga., 317:

124 Ga., 616 (Trans. 179);
27 Am. Ency. Law, 788; 57 N. E. R., 947.
183 U. S., at 475.

If no **new** notice is requisite for the officer to ex parte assess the defaulter for the **current year**, does his **persistency in default** for succeeding years win for him that right for the back years? No rational difference between current and former years, in this respect, can be suggested. In each case he is a tax defaulter, pure and simple, and subject to the defaulter's penalty under the local statute of having the omitted propoerty assessed, by the officer, from the best information he can procure whenever it is discovered. **Tax delinquency acquires no sanctity from age.**

No rational difference between "current" and "prior" years.

Tax delinquency acquires no sanctity from age.

41

A Voice of Dissent: The Kuntz Case.

In at least one case views antagonistic to the above have been expressed.

In Kuntz vs. Sumption, 2 L. R. A., 655, 117 Ind., 1, the Court said, "we hold that the statutory provisions concerning the authority of the County Board of Regulation to increase the valuation of the property of an individual tax-payer listed by him for taxation are unconstitutional. We limit our decision to this point and mark the limit as distinctly and definitely as we can." P. 656.

The doctrine of the Kuntz case as to individual notice being necessary distinctly rejected by U. S. Supreme Court.

The Court goes on to say:

"This notice (of the time and place of the meeting of the Board), it is obvious, cannot require every tax-payer in the county to be present at the meeting of the Board to see that no additions are made to his list. As additions to his list affect him as an individual, he is entitled to notice as an individual."

And yet the Supreme Court of the United State has repeatedly announced that this is exactly what the tax-payer is **not** entitled to:

"A statute which names the time and place of the meeting of the Assessing Board is suffcient notice; personal notice to the tax-payer is unnecessary."

Pittsburg vs. Backus, supra.

"If a Railroad Company is by law entitled to such notice (i. e., separate and individual), surely every individual is entitled to it. Yet if this be so the expense of giving notice, the delay of hearing each individual would render the main

function of the Board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent."

Taylor vs. Secor, supra.

And of course it can make no difference, as far as "due process" is concerned, whether the tax-payer's list is added to because he is an isolated defaulter, or a member of a class whose assessment is to be raised.

Individual Notice and separate hearing unnecessary.

"When they raise it in any county they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing * * * This Board has its time of sitting fixed by law. Its sessions are not secret, no obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in this business of assessing taxes, this is all that can be reasonably asked."

Taylor vs. Secor, 92 U. S., 575.

42

After the Act of 1884-5, p. 30, No Excuse or Pretext Can be Urged by the R. Co. for its failure and refusal to return these shares.

No excuse for non-return after 1885.

The R. Co did not return these shares and as to them was clearly in default. The act of 1884-5 declared in so many words that these shares were taxable.

124 Ga., 614 (Trans. 172, 173).

In the case at bar the Supreme Court says:

"The R. R. Co. was bound to know that this stock was taxable, and its mistaken though honest belief to the contrary, furnishes no excuse for non-payment."

124 Ga., 616 (Trans. 177).

In such a case the Court says:

"He then and there becomes a defaulter."

124 Ga., 616, 617. (Trans. 179, 180.)

Section 855 gave the R. Co. the right to return and be heard even after being in default.

Section 855.

Before assessing these shares the tax officers pleaded with R. Co. to make returns and it declined.

Letter to Scott (Trans. 131).
Letter to Phinizy (Trans. 126, 127, 128).
Wrights Testimony (Trans. 126).

After the Decision U. S. Supreme Court.

Certainly no excuse for non-return after decision of U. S. Supreme Court.

The R. Co.'s duty surely was plain after the decision of U. S. Supreme Court, expressly holding these shares to be taxable to make a new and revised return and then be **heard** as to valuation, if desired.

S. W. R. Co. v. Wright, 70 Ga., 12, h. n. 3.
See Argument, p. 52 to 55 of this Brief.

The Decision of Georgia Supreme Court. To What Credit is it Entitled?

The construction placed by the Georgia Supreme Court upon the Georgia statutes and constitution is binding on U. S. Supreme Court.

The Supreme Court of Georgia has declared in the most unmsitakable manner in the case at bar (124 Ga., 617, Trans. 179-780) that the Georgia law affords the most ample Notice and Opportunity to be heard to every tax-payer and particularly to **this** tax-payer.

And the U. S. Supreme Court has declared:

"The State Supreme Court is the final interpreter of its own constitution and statutes. To it is given the power conclusively to declare their meaning."

In 154 U. S. 421 this Court says:

"The construction placed by the Supreme Court of the State on the State statute that Railroad Companies are given the right to be present and to be heard before the State Board of Tax Commissioners, is conclusive upon this Court."

Pittsburgh, etc., Co. vs. Backus, 154 U. S., 421 (L. Ed.) 1031;
Post vs. Kendall County, 105 U. S., 669; (L. Ed.) 1204;
Atlantic, etc., Co. vs. Georgia, 98 U. S., 309 (L. Ed.) 185.

"This Court has always followed the highest of the State in its construction of its own Constitution and laws."

Elmwood vs. Marcy, 92 U. S., 289 (L. Ed.) 710;
Taylor vs. Secor, 92 U. S., 575 (L. Ed.) 663;
Lent vs. Tillson, 140 U. S., 316 (L. Ed.) 419.

In the above case of Lent vs. Tillson, this Court held that the owner had sufficient notice, and added:

"If we had any doubt of the correctness of these views we should accept the interpretation which the highest Court of the State placed upon the statute. When the inquiry as to whether a State enactment under which property is proposed to be taken for a public purpose accords full opportunity to

the owner at some stage of the proceedings involving his property to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the State will give effect to such enactment as interpreted by the highest Court of the State.

Lent vs. Tillson, 140 U. S., 316, 334 (L. Ed. 426).

Where State Court declares its statutes are not in conflict with the Federal Constitution, this is binding in all but exceptional cases upon U. S. Supreme Court.

"And even where the State Court not only interprets the meaning and intent of its own statutes, but goes further and declares that they do not conflict with the Federal Constitution the decision is binding in all but exceptional circumstances."

Corry vs. Baltimore, 196 U. S., 466 (L. Ed.) 556;
Allen vs. Georgia, supra;
Gallup vs. Schmidt, supra.

"This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is at least a construction which we ought to follow unless we are clearly of the opinion that it is wrong."

Hodge vs. Muscatine County, 196 U. S., 276, at page 279 (L. Ed.) 480;
Simon vs. Craft, 182 U. S., 437 (L. Ed.) 1165;
Hibben vs. Smith, 191 U. S., 309 (L. Ed.) 195.

WRITING CLOSE

II. EQUAL PROTECTION OF LAW.

44

Where it is Charged That Equal Protection has Been Denied in the ADMINISTRATION of the Law, the Fact of Discrimination is Matter of PROOF. No Latitude of intention Should be Indulged in a Case Like This.

This branch of the case deals mainly with the Facts or Proof.

As this division of the case deals mainly with questions of fact and the Court's findings thereon, we will, for convenience, here combine the law Brief and the Argument or comment on the facts.

In what way Plaintiff claims the officers discriminated against Plaintiff, as stated by Supreme Court of Georgia.

The Supreme Court of Georgia, in the case at bar (Trans. 151), aptly states the contention of the Railroad Company under this head. It says: "The plaintiff claims to have proven that the tax officers of the State have applied equal and valid laws, **unequally**, in that:

(1) The plaintiff and the Central of Georgia Company are the only holders of shares of foreign stock in the State who are required to pay tax upon such stock;

(2) That their foreign stock is taken at a valuation grossly in excess of the valuation of other property;

(3) That other property is habitually assessed at only two-thirds of its value, while the foreign stock of plaintiff and the Central of Georgia Railroad is assessed at more than 100 per cent. of its value; and,

(4) That shares of foreign stock and shares of domestic stock are taxable by virtue of the same laws, but the Comptroller General and other tax officers have failed to enforce the statute against the holders of shares of domestic stock."

Wright vs. R. R. C. (Trans. 151).

Findings on facts by lower court and by Supreme Court adverse to R. Co.

On each of the foregoing questions of fact the finding of the trial Court was adverse to the contentions of the Railroad Company, and on a motion for new trial the presiding Judge refused to interfere with such findings, and on appeal to the Supreme Court of the State the latter Court approved and confirmed the same.

Ib. (Trans. 153, 154).

After stating the contention as above of the Railroad Company and the findings of the trial Court thereon, the Court proceeds to declare unequivocally that this clause of the Four-

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teenth Amendment may be violated, not only by the passage of an unconstitutional law, but by the **improper administration** of a law which is, itself, perfectly valid. It says:

Georgia Supreme Court readily admits "equal protection of the laws" may be denied by **mal administration** of a law on part of the State officials as well as by unconstitutional legislation.

"A State acts by its Legislative, its Executive, or its Judicial authorities. It can act in no other way. The Constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of laws, violates the constitutional prohibition; and as he acts in the name and for the State and is clothed with the State's authority, his act is that of the State. This must be or the constitutional prohibition has no meaning."

Citing,
Ib. (Trans. 152).
Neal vs. Delaware, 103 U. S., 397;
Va. vs. Reaves, 100 U. S., 313;
Strander vs. W. Va., 100 U. S., 303;
Ex Parte Va., 100 U. S., 339;
R. R. Co. vs. Chicago, 166 U. S., 226;
Brannen's Fourteenth Amendment, page 97;
3d Current Law, 755.

But Such Discrimination is a Matter of PROOF:

The Court then adds:

But where mal administration is charged it is solely a question of proof, says the Court.

"However, when it is contended that the law of this State is so administered that it denies to a person or class the equal protection of the laws—not that it is unconstitutional on its face, but because the manner of its **administration** is such that it is enforced exclusively against certain classes—**the fact of discrimination is matter of proof, and no latitude of intention will be indulged,** and it is not sufficient to simply allege such exclusive enforcement, but it must also appear that the conditions to which the law was directed do not exist exclusively amongst that class, and that there are other offenders against whom the law is not enforced (Ah Sin vs. Wittman, 198 U. S., 500). As was said by Mr. Justice McKenna, in the case just cited, 'no latitude of intention should be indulged in a case like this. There should be certainty to every intent.'"

"No latitude of intention will be indulged."

Ib. (Trans. 152);
Ah Sin vs. Wittman, 198 U. S., 500.

Domestic Stock Not Taxable:

The Court in the same case proceeds as follows:

"Having reached the conclusion that there was nothing in the law of this State requiring the collection of a tax upon shares of domestic stock during the years involved in the present litigation, of course the failure of the tax officers to collect tax on this character of stock cannot be said to be a denial of the equal protection of the laws to any tax-payer. (Kidd vs. Ala. 188 U. S., 150—195 U. S., 217. Whether there has been such a denial i nother particulars depends upon the proof."

The Court holds domestic stock not taxable under Georgia law and constitution, and that foreign shares are. This is no denial of equal protection.

Ib. (Trans. 153).

* 45

The Proof and Findings of the Court as to the Facts of Discrimination.

The testimony and findings of the lower Court on the point in question cannot be more tersely stated than has been done by the Supreme Court of Georgia in the case at bar, as follows: "The Judge to whom this case was submitted, both upon the law and the facts, has rendered a decree in which he makes the following findings:

The findings on the facts by the lower Court against the R. Co. and in favor of State.

"1. The evidence submitted does not disclose any discrimination in the assessment and levy of the tax on the stock in controversy, compared with other property in the State.

"2. The evidence submitted does not show that the value of the stock placed thereon by the Comptroller General is excessive.

"In addition to this there is in the decree a general finding in favor of the defendants on all of the issues, both of law and of fact. The finding of the Judge on the facts of the case carries with it all the sanctity of a verdict of a jury. Upon a motion for a new trial he has refused to disturb his findings of fact. The case, therefore, stands in the same position before this Court as if there had been a general verdict by a jury for the defendant, and a motion for a new trial had been overruled by the presiding Judge. Under such circumstances this Court invariably applies the rule that the judgment will not be reversed, if there is any evidence to authorize the finding of fact. The plaintiff in error cannot prevail here by simply showing that the preponderance of evidence was in its favor. The burden is upon it to show that the finding is entirely unwarranted by the evidence. It would not be profitable to discuss the evidence in detail, or to attempt to reconcile the con-

The findings of the Judge on the facts has all the sanctity of verdict of jury, says the Supreme Court.

Never reversed if any evidence to authorize the finding.

flicts which appear therein. If there is any holder of shares of foreign stock in this State who is liable for tax thereon who has not been proceeded against by the tax officers of this State, **the record does not disclose the fact.**"

Trans. 153.

No discrimination by the tax officers.

Tax Officers Guilty of No Discrimination, Says the Supreme Court.

With reference to the other questions of fact of alleged discrimination, the Court says:

If any tax-payer undervalued his property, it was without consent and over protest of tax officers, say the Supreme Court.

"It was contended that there is a uniform custom prevailing in this State for tax-payers to return their property at less than its value. If there is such a custom it did not have its origin with the tax officers of this State; and there was evidence from which the Judge could find, even if it did not constrain him to find that tax-payers conforming to such a custom did so without the consent or authority, and **over the protest of the tax officers** of the State.. The law of this State requires that each tax-payer shall return his property for taxation at its true market value. The record discloses that the **Attorney General** of the State has so advised the Comptroller General, and that the **Comptroller General has so instructed the subordinate tax officers of the State.** It certainly cannot be held that a denial of the equal protection of the laws results to the plaintiff from a **custom of tax-payers** in contravention of law, which has arisen over the protest and against the instructions of the tax officers of the State. It would be a startling proposition to say that no person should be required to pay his taxes, because some citizens are shrewd enough or unscrupulous enough to succeed in having their returns received by the tax officers when the valuations are lower than the law requires, and lower than the oath which each tax-payer makes to his return requires. There may be persons within the limits of the State, probably many, who have avoided the burden of taxation, either by not returning their property for taxes or by returning it at a value lower than its true market value. **But the evidence in this case authorizes, if it does not require, a finding that the tax officers of this State were not parties to such a practice.** The administration of of the tax laws of a State will not be declared to be in violation of the Fourteenth Amendment to the Constitution of the United States unless it appears that the officers charged by the law of the State with the collection of taxes **knowningly, wilfully and intentionally** administered the law so as to place upon one person or class a burden from which another person

This is demonstrated by the evidence on the trial, say the Supreme Court.

similarly situated is relieved. **The record does not disclose that such a case has been made out against the tax officers of the State of Georgia** * * * There is nothing in the record to authorize the conclusion that the Comptroller General or the subordinate tax officers have in any instance wilfully, knowingly or intentionally administered the law so that it would be harsh, burdensome or oppressive as to one, and relieve another similarly situated from like burdens. As said by the Supreme Court of the United States, this is a matter of proof. 'No latitude of intention should be indulged in a case like this. There should be a certainty to every intent.' Even if the proof does not show a perfect and exact administration of the law, it fails to show such an adimnistration as would bring down upon the heads of the officers the condemnation of the supreme law of the land. We do not think that the evidence makes such a case as would authorize us to hold that there has been a denial of the equal protection of the laws to the plaintiff, and that therefore its property should not be subjected to the tax sought to be imposed upon it. Coulter vs. L. & N. R. R. Co., 196 U. S., 599; Florida vs. Reynolds, 183 U. S., 471; Winona Land Co., vs. Minn., 159 U. S., 526."

The charge that the Comptroller General or the subordinate tax officers administered the law unfairly against plaintiff is unsupported by the evidence, say the Supreme Court.

Case at bar (Trans. 154).

The only apology we offer for embodying so lengthy an excerpt from the decision is that it exhausts the whole argument upon both the law and facts of the case and renders unnecessary the citation of further authorities or further reference to the brief of testimony.

An apology.

46

A Verdict or Finding Will Not be Set Aside Unless Totally Unsupported by Evidence:

It is useless to cite authorities, State and Federal, to the above proposition. In the Backus case, 154 U. S., 421 h. n. 10, and at 435, it is said:

Verdict or finding not disturbed unless without any evidence to support it.

"Whenever a question of fact is submitted to the determination of a tribunal, if such determination comes into inquiry before the Courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than is so found and determined."

154 U. S., 421, h. n. 10, and at 435;
Commonwealth vs. Improvement Co., 98 Mass., 19;

SE TO EDGE

R. R. Co vs. Treasurer, 2 Dill., 281;
Dows vs. Chicago, 11 Wall., 108, 78 U. S., 65.

47

When the Facts Are Found by the State Court This Court is Concluded by Such Findings.

"On error to State Court this Court cannot re-examine the evidence."

In the case of Egan vs. Hart, 165 U. S., (L. Ed.), 681, this Court ruled as follows:

"On error, however, to a State Court, this Court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding * * * We * * * conclude, that not only the very nature of the writ of error, but also the rulings of this Court from the beginning, make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the Court below, this Court is concluded by such findings. The adjudications are collected very fully in Dower vs. Richards, 151 U. S., 658."

"When the facts are found by the Court below this Court is concluded by such findings."

Citing, Egan vs. Hart, 165 U. S., 189 (L. Ed.), 681;
Dower vs. Richards, 151 U. S., 658;
Bartlett vs. Lockwood, 160 U. S., 368, and many others.

48

The Tribunal's Method of Reaching Conclusion Not Inquired Into.

Appellate Courts do not inquire into tax tribunal's methods of reasons or reaching conclusions.

"The reasons which lead to a conclusion or the methods of computation of values in matters of taxation, by a tax tribunal are not inquired into by Appellate Courts unless that method offends the statute or State or Federal Constitution."

Coulter vs. L. & N. R. R. Co., 196; U. S., 599-610;
Met, St. R. R. Co. vs. State Board, 199 U. S., 1;
Republic Life Ins. Co., vs. Pollock, 75 Ill., 298;
People vs. Barker, 48 N. Y., 70;
Case vs. Dean, 16 Miss., 12.

49

Inequality in Valuations is Nothing Unless in Pursuance of a SCHEME.

Unequal valuations nothing unless part of a scheme.

In Coulter vs. L. & N. R. R. Co. (196 U. S., 599) the same complaint was made as in the case at bar, viz., that the Railroad Company's property was valued at or beyond its

market value, while the other property of the State was valued at only eighty per cent of its value. Mr. Justice Holmes says:

Unequal valuations nothing unless part of a "scheme."

"Inequality, we repeat, is nothing unless it was **in pursuance of a 'scheme.'** To make out that **'scheme'** the anomalous course was followed of putting members of a tribunal established by law upon the witness stand to testify to the operations of their minds in doing the work entrusted to them * * * But the prevailing testimony was that no such **'scheme'** was entertained."

Coulter vs. R. R. Co., 196 U. S., at 610.

The Testimony as to Fairness of Tax Officers.

The testimony sustaining the conclusions of the Court below and of the Supreme Court.

That no such **"scheme"** on the part of the Comptroller General or the subordinate tax officers existed in the case at bar is conclusively demonstrated not only by the conclusions of the Supreme Court of the State above quoted, but by the testimony on which said decision is predicated.

See the uncontradicted testimony of William A. Wright, Comptroller General (Trans. 126, 133, 134 and 135); the testimony of Hon. John C. Hart, Attorney General (Trans. 135 and 136). W. A. Wright says:

"I have invariably stressed and emphasized the fact that it is the duty of the Tax Receivers to see that all property returned to them was returned at its true and full market value and wherever the law made it my duty as Comptroller General to receive the return of property I have adopted the rule of law on the subpect of requiring that it be returned at **its true market value.** This is the **law** of the State as I under stand it, and the **practice** so far as I know and am advised."

Trans. 133, bottom and 134 top.

The testimony, continued.

"The claim is often made by the tax-payer that there are other tax-payers who do not return their property at its true market value, and that they should not be required to return theirs at its true market value, but this claim has its foundation in **sporadic abuses of the law** and not by virtue of the law, nor by its **partial administration.** If the practice exists in any of the jurisdictions of this State wherein property is confessedly returned at two-thirds of its value it is not in consequence of the **law,** nor of **any instructions** which I have given, but in **spite of both.**

"In assessing the stock of the Western Railway of Alabama held by the Georgia Railroad and Banking Company and the Central of Georgia Railway Company I have done so prompt-

The testimony, continued.

ed by the same rule of law which has directed and controlled me in the assessment of all railroad property. The assessments of value for the several years made on this stock was made from the best information I could procure as to its value, and was made by me for the reason that the Railroad Companies neglected and refused to return the property for taxation. These assessments were made in pursuance of official duty and there was no purpose to place an excess of valuation on these shares of stock, nor do I believe that the valuations I have placed thereon are in excess of their true market value * * * I tried to be cautious and conservative, and asked the Railroad Companies to give me any information they had, and they did give it, and I considered it all, and finally reached the conclusion I did with the best information as to this particular property that I could procure."

Trans. 134, 135.

Ditto.

"I have stated, and I repeat, that in making the reductions I spoke of, I made them for the purpose of getting the true market value and not for the purpose of getting at two-thirds of the market value."

Trans. 138, top.

On this point see also the opinion of the Hon. John C. Hart, Attorney General, in reply to the Comptrolled General's request for instructions as to whether property could be valued by arbitrators at less than its true market value. The Attorney General says:

"My official opinion was then, and it is now, that arbitrators have no right to fix the value at any such figure (lower than the market value), but that the law prescribes the rule by which property should be returned for taxation, viz., at its true market value. All property in this State, both corporate and individual, should be returned, and if not returned, assessed in the light of this rule. I do not understand how there can be any question about the proposition. The Section of the Code in plain language requires that the tax-payer shall return his property at its fair market value. The oath prescribed for the tax-payer recites that he has returned it at its true market value, and it surpasses my comprehension how any tax-payer can confessedly return his property at half of its value and insist that he can conscientiously take the oath that it is fair value or its true market value * * * A tax-payer could insist with as much propriety, since there is some property not returned in Georgia at all, that he should not be taxed, as to insist, because there is some other property re-

Ditto.

WRITING CLOSE

rned at half its value, his must be returned at the same rate. The remedy is, in order to equalize taxation, to force the man up who is not bearing his part of the burdens of government and not drag the citizen down to his level who is willing to bear his, or at least is unwilling to shirk it by making a false return."

Trans. 135, 156.

The above is some of the testimony on which the Supreme Court of the State predicated the following language in the case at bar in reviewing the testimony, viz:

The conclusion of the matter, as stated by Supreme Court.

"There is nothing in the record to authorize the conclusion that the Comptroller General or the subordinate tax officers have in any instance wilfully, knowingly or intentionally administered the law so that it would be harsh, burdensome or oppressive as to one, and relieve another similarly situated from like burdens."

See Trans. at 154.

Probative Value of the Affidavits of the Forty Tax Collectors:

Affidavits of forty tax collectors from forty counties.

The ex parte affidavits of some forty tax collectors in behalf of the R. Co., which were used at the preliminary hearing of the Petition for Injunction were allowed by consent of counsel to be received as testimony at the trial on the merits of the case. It will be readily seen that they were negative and vague.

They covered but two points:

(1) That the domestic shares whose corporations paid taxes were not returned for taxation;

(2) That no foreign shares were returned to said officer.

They are negative and vague

It was insisted that the latter mentioned clause of the affidavits, taken in connection with the testimony of the Comptroller General to the effect that he had not commenced proceedings to collect the tax on any foreign shares except the shares of the two plaintiffs in this litigation, established a fixed purpose and policy on the part of the State to single out railroads in general or two particular railroads (plaintiffs) and tax their foreign shares and deliberately omit the foreign shares of other citizens.

They show nothing of value.

So far as these affidavits relate to domestic shares they prove no practice that is not admitted by all and conceded to be both legal and constitutional. (Trans. 153) So far as it is attempted by these affidavits to show that Georgia has adopted a policy or practice to tax only foreign shares owned by railroads or

They establish no intentional discrimination against plaintiff.

by these plaintiff railroads and not tax foreign shares owned by other tax-payers of the State, there is a total failure in the so-called proof.

Of 115 counties only 40 heard from.

There are 115 counties in the State of Georgia. The fact that ex parte affidavits from officers of only 40 counties are presented, is of itself significant.

No proof that a single share of foreign stock was held in one of the 40 counties.

It does not appear from the affidavits themselves or from any other source that there was a single share of foreign stock held by a tax-payer in a single one of the 40 counties mentioned. In his amended answer the Comptroller General swore that he knew of no other shares of foreign stock than those which he had assessed. If the county officers knew of such foreign shares being within their jurisdiction and did not have them returned they certainly violated instructions which the Comptroller General swears, in the portion of his testimony above quoted, he gave to said officers.

In the Comptroller General's sworn answer (which has not been controverted or disputed), he says:

Comptroller swears he knew of no other foreign shares.

"Defendant has not had occasion to assess any other similar stock similarly situated, for the reason he has not been able to discover any other shares of stock in a foreign corporation held and owned by citizens of Georgia."

See Trans. 54 bottom and 55 top.

Supreme Court on This Point:

If there were other foreign shares the record does not show it, say the Supreme Court.

Confirming the above the Supreme Court in the case at bar declares:

"If there is any holder of shares of foreign stock in this State who is liable for tax thereon who has not been proceeded against by the tax officers of this State, the record does not disclose the fact."

Trans. page 153 middle.

50

Some Facts to be Considered as to the Market Value of These Shares.

Some facts

As to the market value of these shares, I submit the following:

(a) They cost a little more than par, as shown by the

And observations as to the market value of these shares

...ition and its exhibits, that is to say, one million and five ...ndred thousand dollars ($1,500,000). (Trans. 20.)

(b) As shown by the gross and net receipts (see Comp...ller General's affidavit), the property has **increased**, cer...inly not **decreased**, in value. It is now a part of a great ...rough line. (Trans. 134-135-137.)

(c) The Comptroller considered the value of the property ...each back year, which was as fair a basis as could be ...vised. No better has been suggested. (Trans. 134.)

(d) It is shown that the stock was a dividend earner, and ...hat they were actually declared in many years; perhaps in ...ll years wherein they did not spend the money on permanent ...tterments. (Trans. 128 and —.)

(e) Plaintiff in its annual report admitted the shares to be ...orth $900,000,000. (Trans. 130.)

(f) Finally, the assessment of the Comptroller, even if ...excessive is conclusive under the statute, and on principle ...should be. Because if the delinquent or careless tax-payer ...who failed to or refused to return all the property ...and be heard thereon, when called upon by the ...statute to do so, were then to be given the same ...right to contest and arbitrate unreturned or omitted property, ...the very object of the law would be defeated, which is to ...force the tax-payer to make a complete return of all his ...property on the day fixed by the statute on the penalty that ...if he failed to do so, the assessment by the taxing officers ...should be final.

51

But the Very Acts of Alleged Discrimination Complained of in the Case at Bar Have been Distinctly Held by the Supreme Court of the United States NOT to Violate Any of the Provisions of That Constitution.

Fla. Cent. & P. R. Co. vs. Reynolds, 183 U. S., 471 at 474 and 481.
Kidd vs. Ala., 188 U. S., 730.

But the very acts and conduct of the officers complained of by plaintiff have been held by the Supreme Court of

In the Florida case, by special act of 1885, "back taxes" were required to be assessed by the Comptroller General of Florida against the Railroad Company for the years 1879, 1880 and 1881 as escaped taxes for those years. No such act was passed to require the County Assessors to collect these

U. S. not to violate 14th Amendment.

"escaped taxes," on other real estate although such proper was equally liable to taxation under the general law of t State. The Supreme Court of the United States held th th's was not violative of the Fourteenth Amendment as "due process" and "equal protection," and that the State h a right to pass ex post facto remedial laws for the collecti of "escaped taxes" from the Railroads in the years previous the passage of the act. The law of Florida, as shown by th case, levied the same tax upon all real estate, but when came to the matter of collection of these "back taxes" the was an act passed requiring the Comptroller General to colle the back taxes from the Railroads, but there was no act i structing the County taxing officers to enforce these taxe as to other citizens. The complaint was not that all rea estate was not taxed alike, but that in the collection an enforcement of the law the very statute itself denied "equa protection" to the railroads' real estate.

The Supreme Court in the case held as follows:

Ditto.

(a) It is not unconstitutional for a State to reach back an "collect taxes from certain kinds of property wh'ch were no at the time collected through lack of statutory provisions thereof, or in consequence of a misunderstanding of the law or from neglect of administrative officials without also making provisions for collecting the taxes for the same years on other property * * * The case is one in which general levies having been made for the years named, certain property which ought to have paid taxes under them—and thus contributed its share of the expenses of the State—failed to do so, and the effort is to compel that property to discharge its obligation. The objection is not that the property ought not during those years to have paid its proportion of the taxes, but that it ought not now be compelled to pay such proportion because certain other property was similarly situated, and no effort is made to compel payment from it.

Ib. 183 U. S., at 474.

In the same case the Court further says:

Ditto.

"If taxes are to be regarded as mere debt, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of the government, then it does not lie in the mouth of one

WRITING CLOSE

called upon to make this contribution to complain that some other person has not been coerced into a like contribution."

Ib. 183 U. S., at 181.

In the same case the Court says, in conclusion:

"Our conclusion is that so far as the Federal Constitution is concerned the Legislature of Florida had the power to compel the collection of delinquent taxes from the Railroad Companies for the years 1879, 1880 and 1881, even though it made no provisions for the collection of delinquent taxes for those years on other property." ditto

Ib. 183 U. S., at 181.

ARGUMENT.

GEORGIA'S SYSTEM FULLY COMPLIES WITH REQUIREMENTS OF DUE PROCESS OF LAW.

What the 14th Amendment requires.

All that is demanded of any State system of taxation by the Fourteenth Amendment of the Constitution of the United States providing for **Due Process of Law** is that the tax-payer in **ad valorem** taxation shall have Notice and an Opportunity to be heard before some officer or tribunal at some stage of the proceedings, either before or after the assessment or at any time before final judgment; and that notice need not be personal or individual, but may be merely statutory and collective.

This the Georgia statutes fully complies with.

§§804-805 provide the Notice and summons.

Sections 804 and 805 give Notice to all Tax-payers in plaintiff's class to make their "tax returns" **under oath,** on or before **May 1st,** of each year.

This is the statutory Notice of the State's demand for taxes.

§812 provides the Court and opportunity to be heard where tax-payer makes returns.

Section 812 of the Political Code declares that these returns shall contain a complete itemized list of **all** the property of the tax-payer, valued by him under oath at its true market value; and it then confers upon the tax-payer the right in case his said returns are unsatisfactory to the officer, to have notice of that fact within sixty days, and the further right, if he so desires, to be "heard" and to "dispute with the State" the question of the value of his property and the amount of the tax to be levied thereon, before a Board of Arbitrators selected jointly by himself and the State.

This is the tax-payer's **"hearing"** provided for by the statute.

Could **Notice** be more complete? Could **Hearing** be more ample?

§813 et al. provides where no returns are made for the officer to ex-parte assess.

Section 813 and its cognate section (874, 879, 847, 949 and 855) proceed to declare that if the tax-payer fails to make the said returns, **in whole or in part,** required by the statute, and avail himself of the ample hearing therein afforded, then, as to all unreturned property, the officer as soon as he discovers the same whether in the current year or afterwards, shall assess and value it "from the best information he can

procure which assessment shall be conclusive, etc."

Omitted property subjected to "ex parte assessment" or the "doom of the assessor."

Here the law "discriminates" against omitted property and penalizes the defaulting owner as it has a perfect right to do by subjecting the owner and his omitted property to the "doom" of the assessor. (Cooley on Taxation, 619 to 624; 27 Am. & Eng. Ency. (2d Ed.) 639, and citations.) Also see this Brief, pages 13 to 16.

Thus the statute not only makes ample provision for the tax-payer to have his day in Court and "dispute with the State" over his taxes (124 Ga., 617, Transcript 180), but it also puts him upon express notice at the time of making his return that if he **omits** or **withholds therefrom** any part of his taxable property and thereby neglects and ignores the opportunity afforded him by the statute to "return and be heard" he shall not have, as a matter of right, any further opportunity or a **second "day in Court"** to "dispute with the State" on this subject.

Failure to make returns simply subjects the delinquent to the customary fate of a defaulter.

In other words, he is notified in advance by the statute that his default will bring upon him the customary fate of the defaulter, viz., that as soon as he is adjudged to be in default by the entering up by the officer of the assessment or quasi tax judgment, "the door of opportunity will be closed to him, so far as the right to have the mutual right between himself and the taxing power adjusted by arbitration is concerned."

124 Ga., at 617 (Trans. 180).

In other words, employing the very language of the Supreme Court of Georgia in the case at bar:

The Georgia law affords the amplest notice and opportunity for hearing to every tax-payer Say the Supreme Court.

"The Georgia law affords to every citizen, individual or corporation ample facilities for the preservation of his rights as against the tax-gatherer, always provided that he makes a return to the proper officer of the property that he owns. It presupposes that the tax-payer will disclose to the officer **all** of his taxable property, and it requires him to know whether his property is taxable or not. The requirement of **Candor** in disclosing the ownership is really at the foundation of our tax system. So long as the citizen complies with that requirement he is afforded every opportunity to dispute with the State the question of the value of his property and the amount of taxes to be levied thereon. When he fails to

E TO EDGE

return in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter."

124 Ga., at 617 (Trans. 179).

The Tax-payer's Right to Make Returns After Default but Before Assessment:

Tax returns for former years may be made by one in default, when

That the law gives the tax-payer the **right to make** returns and imposes upon the officer the duty to receive them even after the tax-payer is in default and up to the very time of an actual assessment or tax judgment, is expressly provided for in Section 855 of the Political Code which declares:

"Receivers and collectors are required to receive the returns and to collect the taxes thereon for **former years** when any person is in default, which taxes shall be assessed according to the law in force at the time the default occurred, and shall be so specified in the digest."

Political Code, Sec. 855; 124 Ga., 615 (Trans. 178); where the Court says:

"The fallacy of the 'closed book' theory is shown, we think, by Section 855 of the Political Code, which provides," etc.

124 Ga., at 615 (Trans. 178).

At each annual return on May 1st the mandate is for returns for **prior** years as well as for current year.

Therefore, as will be seen, on **every** first day of May the Statutory Notice and demand upon the tax-payer is to come into the tax Courts and bring with him a complete list under oath of all his property owned by him in **that year**, and also of any items of property omitted by him from **his returns of previous years**, and which should have been returned for taxation in those prior years.

The mandate of the statute for returns for **prior years** is just as imperative as for the **current** year.

This is the unequivocal command of the statutes, for the highest Court of the State has in express terms construed them to mean this very thing. It is as though these very words were written into the statutes and a formal mesne process in writing reciting in terms these instructions were personally served upon the tax-payer twenty days before **May** the **1st** of each year.

This call and opportunity remains open until actual assessment.

In the case at bar, 124 Ga., at 616 (Trans. 179), the Supreme Court of the State says:

"The case of Walker vs. Whitehead, 43 Ga. 551, 552, furnishes an irresistible argument for holding that the Comp-

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troller is not concluded by the acceptance of returns from making a **subsequent assessment for omitted property.** Discussing what is now Section 855 of the Political Code, it was said: "That the taxes were due five, four, three and two years ago, and have gone unpaid, is no relaxation of the obligation to pay them. Can it be contended that because one in 1866 or 1868 managed to conceal his taxable property, he is thereby released from his obligation to pay the tax thereon, when he finds it no longer possible to hide it * * * These taxes are just as much due **now** as they were in the year they were incurred. They are a **present, subsisting,** legal obligation * * * The duty to pay exists **now;** it is a **continuing, present** obligation and duty, just as imperative **today as it was last year.** Section 855 provides how taxes for **previous years** shall be **given in** and paid, and one who today fails to **give in** and pay taxes upon property **not given in** and paid in **former** years fails in a **present duty,** and it is perfectly competent to affix a penalty on him not for his past, but his present and future failures."

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124 Ga., at 616 (Trans. 179);
Walker vs. Whitehead, 43 Ga., 551, 552.

Section 855 Addresses Tax-Payer and Tax Receiver Alike:

But the statute does not stop here. It (Section 855) addresses the **tax-payer** and the **tax receiver** at one and the same time; it **informs** the tax-payer that if from any cause he fails to make the required return at the appointed time (May 1st of each year), he is invited and called upon to do so at any subsequent time before there has been an actual assessment by the officer; and it **instructs** the tax receiver (here the Comptroller General) "to receive the returns and to collect the tax thereon for former years * * * according to the law in force at the time the default occurred," that is to say, **"according to the law,"** or procedure in cases where **returns have been made,** as contained in Section 812 of the Code providing for revision and arbitration of returns.

This is the
thoritative
construction
placed upon
the statute
the highest
Court of the
State.

New Process Each Year.

Here, then, a new notice and new process is formally served upon the tax-payer each succeeding year. He is not left (as Railroad Counsel insist) to rely alone upon the statutory process issued in the initial year when the tax first became due. This process is formally renewed each year

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when the tax-payer is called upon to make his annual returns, including his returns for prior years, and under Section 855 the door of the tax Court is left open up to the very hour the officer enters up the tax judgment by an actual ex parte assessment of the **unreturned property** from the best information he can procure. This has been the law and the practice in Georgia for 100 years—ever since the Acts of 1804 and of 1813. As a consequence no penalties for a default are ever imposed or collected where the tax-payer, though in default, gets in his returns before the tax judgment or assessment is actually entered up.

As was said in 62 Ga., 504:

The Assessment is the Quasi Tax Judgment.

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"It was the **assessment** of the taxes made by the Comptroller General that was the foundation of the tax fi. fas. issued against the defendant; that was the **judgment,** so to speak, upon which the fi. fas. were based; the return of the defendant might have remained in the Comptroller General's office for an indefinite period of time without any pecuniary detriment but for the assessment made upon that return," etc.

62 Ga., 504.

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So if the tax-payer gets his returns in before the officer actually assesses h's back taxes those returns must be received and treated by him as all other tax returns are treated, viz., if they are changed or revised b ythe tax officer the tax-payer must have notice and the opportunity to arbitrate as provided in Section 812. This opportunity was open to the Railroad Company from the initial year in 1895 down to the time of the final assessment made by the Comptroller General at the beginning of this litigation.

V.

"THE ORIGNAL NOTICE A SPENT FORCE," SAYS THE RAILROAD COUNSEL.

Mr. Lamar, in his Brief, says:

ent Force."

"The original notice of 1895 was a 'spent force.' It had accomplished its work in bringing the tax-payer into the tax Court in 1895; when the return was **accepted** and the tax entered on the digest there was a **final judgment** which could

not be changed without a new notice, given in pursuance of law."

This theory cannot be applied to property omitted from the returns and therefore not included in the quasi suit.

But in the light of the provisions of our Georgia law, as above outlined and interpreted by the highest State Court, the **'spent force'** theory vanishes as mist before a rising sun. That theory proceeds on the idea that when a process issues and the defendant in response comes into Court and a judgment is reached on the subject matter of that suit, the force of that process is spent.

But we have seen that the unreturned property was not included in the subject matter of that quasi suit—that the "acceptance" of the **return actually made** was no bar to the returns which were **not** made.

124 Ga., 616 Top (Trans. 179) top;
27 Am. & Eng. Ency. of Law (2d Ed.) 701;
Sturgis vs. Carter, 114 U. S. 518.

"Acceptance" of the return actually made no bar to the returns which were not made.

It might be safely conceded to be true that the original process of the initial year is "spent" and the "books are closed" as to property actually returned and "accepted"—for this was matter before the Court, litigated and adjudicated. But the property unreturned—concealed and withheld—was never before the Court, never litigated, and never adjudicated. As to this unreturned property, the owner receives through the statutes not only the original notice of the initial year when the tax first became due, but each year thereafter, and all the time, a **new and continuing notice or process,** bidding him to come into the tax Court and bring his returns and values of **all property omitted in the prior years.**

Besides, as the unreturned property, there is a new and continuing process bidding the delinquent to bring in delayed returns and be heard.

VI.

PROCESS TO BE BY LAW AND NOT BY FAVOR, SAY RAILROAD COUNSEL.

After the decision of the Supreme Court of the United States holding that these shares were taxable to the Georgia Railroad and Banking Company the Comptroller General wrote Jacob Phinizy, the President of Plaintiff, calling for a return and valuation of this property, and saying: "I expect to proceed in this matter sometime next week, if possible."

Trans. 125, 126 and 127.

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Admit that the statute does not provide for this particular form of notice or any individual notice to be given by letter or otherwise and that th's personal notice was a **favor granted** and **not a right to be demanded** under the statute. In the light of the law (Sec. 855, 812) this personal notice is most significant and bears directly upon the question of plaintiff's notice and opportunity **under the statute** to "make returns and to be heard," and its refusal to do so. It accentuates the Notice of the statute and the right and opportunity which plaintiff did have under Sec. 855, independent of **any personal** notice, which was to make his returns, whereupon the officer would be compelled to receive them and arbitrate them if desired under 812; it made the fact clear that pla'ntiff knew of this right and privilege and deliberately chose to ignore and disregard it by formally refusing to make the returns, not for want of opportunity, but on the express ground that it did not owe the taxes. This certainly disposes of the claim that the assessment was made "without the right and opportunity to be heard," and as such was **"unreasonable, arbitrary and unjust."**

VII.

THE RAILROAD COMPANY KNEW WHEN ITS RETURNS WERE ACCEPTED THAT OMITTED PROPERTY WOULD BE ADDED, WHENEVER DISCOVERED:

Railroad Counsel in their Br'ef (See Mr. Lamar's Brief before the Supreme Court of Georgia, p. 22) recognized that a **Board of Equalization** can make changes in assessments without new or additional notice because the tax-payer **"knew** that the Board could change the return at its annual meeting," and "must take notice and act accordingly," citing the State Railroad Tax cases, 92 U. S., 609.

For precisely the same reason under the Georgia Tax system the tax-payer in making his returns is put upon specific notice by the statute that any and all property withheld by him will be added to the list and valued by the tax receiver from the best information he can procure.

At one and the same time he is given the opportunity of

returning and being heard and having the values determined by an impartial tribunal; or of not returning and having the omitted property listed and valued ex parte by the receiver from the best information at his command. So that in the very language of Mr. Lamar the tax-payer "knew" when he made his incomplete returns that the property withheld or omitted would be added and valued by the tax receiver whenever discovered, and that "the tax-payer must take notice and act accordingly."

To use the language of Railroad Counsel, under such a statute, "the tax-payer must take notice and act accordingly."

See Mr. Lamar's Brief, page 22 and 23.

The taxpayer knew this although his imperfect or partial returns may have been "accepted" by the tax receiver on the faith that they were full and complete returns; the "acceptance" under such circumstances not being binding on the State in the sense of being a judgment. (27 Am. Eng. Ency. (2d Ed.) 701.)

VIII.

TAX-PAYER'S ASSURANCE IN LEAVING THE TAX OFFICE.

It is not true, therefore, as claimed by Railroad Counsel, that the Railroad Company in leaving the Tax Court after its returns were "accepted" did so with the assurance that no additions would or could be made to the Tax Digest without special and personal notice served upon it and opportunity to be heard in opposition.

Under the Georgia statute. The R. Co. in leaving the tax Court, after its incomplete returns were accepted, did so with the full knowledge that the property omitted would be added by the officer, if discovered.

On the contrary, after making its incomplete returns, which the officer in good faith accepted as full and complete, the Railrod Company in taking its departure from the tax office did so with the full knowledge expressly given by the statute itself that the property omitted from its returns would be added to the digest and ex parte valued by the officer whenever discovered; it left the tax office with the perfect understanding that it was leaving behind it and waiving its opportunity and privilege as matter of right to have any other "hearing" in the tax court with respect to the property which it was concealing, withholding, or omitting from its said returns. In such a case the tax-payer, instead of being denied a "hearing," is running away from a "hearing." If his concealment is con-

The R. Co. was not denied a hearing, but ran away from a hearing which it could have had by simply returning the omitted property.

scious and intentional a "hearing" is the very thing he does not want as to the omitted property, for in silence and concealment alone can such property enjoy immunity from taxation.

IX.

RAILROAD COUNSEL'S MAIN RELIANCE IN THE CASE AT BAR IS BASED ON THE FALLACY THAT "BACK TAXES" ARE A PECULIAR CLASS OF TAXES AND ENTITLED TO SPECIAL PRIVILEGES:

Some further observations in reply to Railroad Counsel's positions.

"Back taxes," what they are.

It is claimed that taxes on property omitted from the returns of prior years stand upon a different footing as to "Notice" and "Hearing" from taxes on property omitted from returns in the current or present year. They have come practically to admit (See Mr. Cunningham's Brief in the Supreme Court of Georgia, page 85) that the tax officer may be authorized to ex parte assess property unreturned for the current year but claims this power does not extend to unreturned property in prior years. In other words, it is claimed that "back taxes" are to enjoy special favors that current taxes are not permitted to receive.

Nothing peculiar about them.

We respectfully submit that no rational excuse can be given for the distinction contended for (See this Brief on page 22, par. 40) .

They are simply taxes which ought to have been paid long ago, but which have been evaded and successfully dodged by the defaulting tax-payer, until run down by the tax officer.

"Back taxes" are nothing more nor less than delinquent taxes—taxes past due for **prior years,** which ought to have been paid in those prior years, but which were illegally left unpaid and still withheld from the public treasury by the defaulting taxpayer.

The fact that they are **"back taxes"** and not over due **"current taxes,"** are not to the **credit** but to the manifest **discredit** of the defaulting taxpayer. His neglect of duty and failure and refusal to pay his taxes at the proper time cannot be invoked for the purpose of having accorded to him a more ample tax procedure, including additional **individual notice,** than is afforded the vigilant tax-payer. The tax delinquent has already had the same Notice and the same Opportunity for a Hearing afforded him in the Statute, that the vigilant and prompt tax-payer enjoyed who promptly paid his taxes. More, he has had this Notice and Opportunity multiplied many

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times over as in every year since his first default and up to the very hour of the assessment he had been notified by the statute (Section 855) to make his returns and be heard under Section 812.

His very default is claimed by R. R. Counsel to put him in favored position, by which he is to have another day in Court.

But the contention of Railroad Counsel is that the taxpayer's very default in refusing to make returns and in refusing to pay his taxes at the proper time, which resulted in his taxes being classified as **"back taxes,"** puts the defaulter in a favored position and opens up to him the broader privileges of individual notice and an additional opportunity of being heard that is not afforded in the collection of past due taxes for the current year.

Is the tax delinquent entitled to a new, special and individual **Notice** and a second opportunity to "dispute with the State"—a second day in Court—simply because these are "back taxes" and not "current taxes?"

He can take no benefit from his own wrong.

They are "back taxes" by his own fault. Is he to avail himself of his own wrong to claim a benefit from his own evasion of the law? Surely not.

As was said in Sturgis vs. Carter, 114 U. S., 511 (L. Ed.) at page 243, first column top:

"The contention is that a tax-payer who has been evading the payment of his taxes due from him by making false returns, can shield himself behind the annual settlement (here the "accepted returns of the Comptroller) * * * in which his returns were **assumed** to be true, and that the Legislature can pass no Act by which the falsity of the returns can be limited * * * in other words, that the tax-payer has a vested right in the fruits of his false returns. Such a proposition cannot be sustained."

114 U. S., 511 (L. Ed.) at 243, first column top.

X.

"IN ADDING OMITTED PROPERTY TO THE TAX DUPLICATE A NEW AND PERSONAL NOTICE AND HEARING MUST BE GIVEN TO THE OWNER," SAY THE RAILROAD COUNSEL:

Adding omitted property calls for new notice, says R. R. Counsel.

Counsel for the Railroad Company cite in support of the above proposition several text writers and some State and District decisions which, as far as they are accessible at this

writing, have been carefully examined. The text writers cited are 27 Am. & Eng. Ency. of Law, 705; Welty on Assessment, 37; Cooley on Taxation (3d Ed.) 627. The State and District decisions cited appear to be those on which the above text authorities are predicated.

They cite certain text writers and a few State and district decisions.

The only Georgia decision cited to this point is the D'Antignac case, 31 Ga., 715, which does not sustain the proposition, and even this case has been, in 106 Ga., at 323, discredited, and the very clause quoted by R. R. Counsel denounced as **obiter dicta.**

See Dubignon case, 106 Ga. at 323.

The only Georgia case cited 31 Ga., 715, does not sustain the point.

In those States whose decisions are cited to this effect we submit there is no statute, as in Georgia, subjecting the defaulting tax-payer to the "doom" of the assessor, as a penalty for his omission to make returns in the first instance. On the contrary, in those States there are statutes providing for **special notice** for assessing omitted property and thus rendering such decisions necessary in those States, but wholly inapplicable to the tax system in Georgia.

Why the authorities cited cannot apply to the Georgia system.

The Georgia statute puts the tax-payer in default and penalizes him for omitting from his returns any portion of his taxable property in the first instance; it declares him to be a **"defaulter"** and subjects the "omitted" property to an ex parte assessment or to the "doom" of the assessor.

The Georgia statute puts a penalty upon the tax-payer and puts him upon notice of that penalty in advance of making his returns, viz: if he omits from his returns any property it shall be ex parte assessed by the officer if discovered.

In the States mentioned the failure to make full returns at the prescribed time is not visited with the penalties or conditions imposed by the Georgia statute. In such States the statute often is content to treat "omitted" or "escaped" property merely as newly discovered property subject to taxation, and, therefore, entitled to the benefits of notice and hearing afforded to property returned in the first instance. Under such a scheme, of course, the tax-payer, unless given notice and opportunity for hearing required by the statute, would be denied "due process of law" as **administered in those States.** As was said by the Supreme Court of the U. S. in the case of Walker vs. Sauvinet, 92 U. S., 90, 93:

"Due process of law is process due according to the law of the land. This process in the State is regulated by the law

f the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land."

Walker vs. Sauvinet, 92 U. S., 90, 93.

The tax-payer is therefore not taken by surprise. He is made fully aware by the statute of what the result of his failure to return in whole or in part will be.

It will be seen that the taxing statutes of those States from which the Railroad Company's authorities are cited differ in two essential particulars from our taxing statutes:

(1) Under the former, "ex parte assessment" or the "assessor's doom" does not follow as a necessary sequence a failure to make returns; it does not constitute the very "foundation of the system" as it does in Georgia. (124 Ga., 617; Trans. 180).

The "Assessor's doom" is at the very basis of the Georgia system.

(2) Nor is the owner of "omitted property" denounced by the statutes of those States as a "defaulter" and made subject to the pains and penalties of a defaulter for omitting to make his returns in the first instance.

(3) Besides, under the Georgia Statute (Sec. 855, Pol. Code) there is in point of fact a new and continuing satutory Notice; and in the case at bar the tax officers, before making the ex parte assessment, not only **notified** but **importuned** the Railroad Company to make its returns, when it would have been heard (Trans. 125 and 126).

We respectfully submit that these distinctions adequately distinguish the authorities cited from the case at bar. As before stated this Court, in applying the principles of the Fourteenth Amendment to the taxing system of any State, has only to inquire whether the taxpayer, who invokes it, has ever had **one notice** and **one opportunity** to be heard, at some stage of the proceeding, either before or after assessment, before **some tribunal.** All that the Fourteenth Amendment requires is that he shall have **once** enjoyed this right and privilege. If it was accorded him and he neglected it, he alone is to blame; the Fourteenth Amendment has been complied with.

This distinguishes the authorities cited from the case at bar.

If opportunity be given for a hearing before the tax officer or other tribunal provided by the statute for that purpose, nothing more is required; and if the taxpayer fails or neglects to make his return and valuation of his property, in whole or in part, he has **had his day in Court** with respect to such **unreturned or omitted property** as fully and completely as with respect to the property which he actually did return.

The Georgia system continued.

The decisions cited by R. Co. depend mainly upon the local statutes.

Whether, therefore, the delinquent tax-payer who has once had an opportunity to return all his property and to have a hearing thereon, is entitled to a **second** notice with respect to omitted property for the current or past years, depends upon the statute. This principle will explain most, if not all, the authorities relied on by Counsel for the Railroad Company.

"Ex parte assessment" as a penalty.

Under the Georgia system an ex parte assessment is one of the **penalties** for the non-return and non-valuation of the property, designed for the very purpose of constraining the tax-payer to come up promptly in the first instance and make a clean breast of all his property—a full and complete return, holding back nothing—on penalty that if he fails to do so and is detected, he waives or forfeits his right thereafter to have any voice in the assessment and valuation of the omitted property.

The Georgia system continued.

The very scheme of the law is to constrain the tax-payer to make a complete return in the first instance.

The scheme of the law is to stimulate the tax-payer to make a full and complete return of every item of his property **at the time prescribed by law,** and to **punish** him if he does not. Small would be the inducement to a dishonest or reluctant tax-payer, for making a full and complete return in the **first instance,** if by **not** doing so he would still, if detected, be afforded the same right of individual valuation, contest and arbitration accorded to a tax-payer who makes an honest return at the time prescribed by law.

XI.

UNDER NEITHER THE LAW NOR THE FACTS HAD THE RAILROAD COMPANY ANY EXCUSE WHATSOEVER FOR DEFAULT AND NON-RETURN, AFTER THE ACTS OF 1885:

The Acts of 1884-5, p. 30, declared in so many words these shares to be taxable.

As before stated, to be a defaulter implies that he had had notice and an opportunity to be heard—his day in Court, and defaulted in making his returns, and continued in default. A partial return is a partial default. The Railroad Compnay did not return these shares for taxation and as to them defaulted. It was bound to know the law and to know that they were taxable. Whatever reason might have existed prior to the **Acts of 1885, p. 30,** for believing these shares were non-taxable, **after** the passage of that Act, declaring in so many words that "per-

sonal property shall be construed for purposes of taxation to include" **this very class of stock,** there was absolutely no excuse or pertext that can be urged for its failure and refusal to return these shares.

Thereafter there was no excuse for failure by R. Co. to return them for taxation.

Up to that time the decision in 64 Ga., 799, to the effect that the situs of these shares for taxation was in Alabama and not in Georgia, might be claimed by the Railroad Company as a reason for not returning these shares. But the Supreme Court in the case at bar says:

"But by an Act approved October 20th, 1885 (Acts of 1884, 1885, page 30), the General Assembly very effectually and emphatically upset the doctrine of that case (64 Ga., 799) by declaring (Sec. 2) that personal property shall be construed for purposes of taxation to include * * * all stock and securities whether in corporations within this State or in other States owned by citizens of this State, unless exempt by the laws of the United States or of this State."

Justice Candler, 124 Ga., 614 (Trans. 172, 173).

The highest Court of the State has so declared in the case at bar.

The Court further says:

"The Railroad Company was bound to know that this stock was taxable and its mistaken, though honest belief to the contrary, furnishes no excuse for non-payment."

124 Ga., 616 (Trans. 177).

Again the Court, in the same case, says:

"When he fails to return in **whole** or **in part,** fraudulently or through an honest mistake, he then and there becomes a **defaulter."**

Ib. 124 Ga., 616, 617 (Trans, 179, 180).

Under §855 the R. Co had the privilege and opportunity and it was its duty to make the returns at any time, even after it was in default, clear down to the time of actual assessment in 1905.

Under Section 855 the Railroad Company had the right and it was its duty to make its return of this property **at any time** before final assessment, and the duty of the officer was to receive the same and give it a full hearing, as is provided for in Section 812.

Code Sec. 855.

XII.

THE RAILROAD COMPANY NOT ONLY HAD STATUTORY NOTICE, BUT THE TAX OFFICERS PLEADED WITH IT TO MAKE RETURNS AND THE R. R. CO. REFUSED.

R. Co. had not only statutory, but personal and individual notice to make returns and be heard.

But not only did the statute afford it ample notice and opportunity to make the returns, but the **officers,** before proceeding to assess, gave special and personal notice and repeatedly invited returns, which were refused.

See correspondence between Comptroller and T. K. Scott (Trans. 131, 126.
See also letter of Wright to Jacob Phinizy, President (Trans. 126, 127, 128).

The officer before assessing invited returns.

Referring to this correspondence, the Supreme Court, in the case at bar, says:

R. Co. formally refused and nothing was left the officer to do but to assess.

"Other correspondence took place between the Comptroller General and various officers of the Georgia Railroad, including the General Counsel, who eventually submitted to the Comptroller General a statement, etc., etc. * * * and at the **same time protesting that the stock was not liable** for taxation and **refusing to make any return** of it for that purpose."

124 Ga., 612, 613 (Trans. 176).

Unreasonable, Arbitrary and Oppressive:

In the light of the above how can it be said the assessment was "unreasonable, arbitrary and oppressive?"

In the light of the above, with what reason or grace can it be urged by R. R. Counsel that this assessment has been "without notice of the intended addition years after accepting the return and without **a statute providing for** an opporunity to be heard," and that the same is void **"because unreasonable, arbitrary and oppressive?"**

The Comptroller General's considerateness and forbearance.

The Act of 1885 had thundered it into the Railroad Company's ears that these shares were taxable and each year thereafter Sections 805 and 855 called upon it to make the returns not only for the present but for the prior years and to be "heard" and to **"dispute with the State"** as to the value and the amount thereof. When it failed to make the returns in the first instance and in each successive year, the officer did not arbitrarily take snap judgment; he did not do even as

he had a right to do with a person in default, viz., to at once **ex parte assess.** But when he first discovers the omitted property in 1901 he writes to the Railroad Company and begs for a return of these shares as authorized and permitted by Sec. 855, and the Railroad Company, through its General Manager, replies:

"The shares of the Western Railway of Alabama have not been returned for taxation because I know of no law requiring them to be so returned."

The R. Co.'s persistent and wilful refusal to comply with the law or the officer's demand.

(Trans., page 126 and 131.)

This letter was followed by a **petition for injunction to ENJOIN** the officer from taking any steps to collect said taxes. That suit was finally determined by the Supreme Court of the United States (195 U. S., 219), holding that these shares **were** taxable, as the property of the Georgia Railroad and Banking Company.

It even defied the decision of the U. S. Supreme Court, declaring these shares were taxable.

Again, the officer before making the assessment considerately brought this decision to the Railroad Company's attention and appealed to the company to pay these taxes. (See Comptroller's testimoney and correspondence, Trans. 126 to 130). Th result of this correspondence was that the Railroad Company again protested (Transcript 176) "that the stock was not liable for taxation and refused to make any return of it for that purpose," but filed another suit in the State Court to enjoin the Comptroller General from taking any steps to collect these taxes.

The Comptroller again appealed to R. Co., citing this decision. It still obdurately refused to make any returns whatsoever.

124 Ga., 613 (Trans. 176).

In These Circumstances the Railroad Company's Duty Was Plain:

It had been pointed out clearly in the case of S. W. R. Co. vs. Wright (70 Ga., 12., h. n. 3, and at 23 and 24). The Supreme Court of the U. S. had in that case, as in the case at bar, held certain unreturned property in prior years to be subject to taxation.

R. Co.'s duty to make returns then was too plain.

The Court in that case says:

"After executions for taxes had been issued against this

had been early pointed it in 70 Ga., h.n. 3.

Company by the Comptroller General, contested, carried to the Supreme Court of the United States, and two-thirds or more of the Company's road and property had been relieved of the **ad valorem** tax, the **Company ought to have made a new or revised return.** Having **failed to do so,** the Comptroller General was authorized to correct the original returns and to assess that portion of the road and propetry subject to the tax as was then due and unpaid."

State vs. S. W. R. R., 70 Ga., 12 h. n. 3.

XIII.

THE UNITED STATES SUPREME COURT HAS NEVER DECLARED TAXING LAWS OF ANY STATE UNCONSTITUTIONAL FOR WANT OF DUE PROCESS OF LAW:

is Court's titude to- ard the tax atutes of a ate in apply- g the 14th nendment.

It is not claimed that the foregoing observations contained in this argument reconcile all of the authorities cited by counsel for Railroad Companies and bring them into harmony with the views herein expressed. It is conceded that there are a few decisions of District Judges, and perhaps two or more State Courts, where it was held that a want of specific personal notice, when omitted property was being assessed, amounted to a denial of "due process of law."

never has clared one d as want- due notice l opportuni- to be heard.

It is interesting, however, to observe in this connection that the Supreme Court of the United States has been more cautious. In deed, it is asserted by Mr. Judson in his work on Taxation in the chapter entitled "Due Process of Law in Taxing Procedure," as follows:

"It is noticeable that in no cases has the Supreme Court of the United States declared the tax procedure of a State wanting in respect to the requisite notice and hearing, though numerous cases of alleged want of due process of law in assessment or collection of taxes have been presented."

Judson on Taxation, page 379.

In this connection we may recall the language of this Court, already quoted in this Brief, in the case of Henderson Bridge Company vs. Henderson, 173 U. S., 592 at 615 (L. Ed.) at 431, where it is said:

s Court on t point s:

"But in order to bring taxation imposed by a State or under its authority, within the scope of the Fourteenth Amendment

of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."

Henderson, etc., vs. Henderson, 173 U. S., 592 at 615.

"In order to bring taxation imposed by a State or under its authority within the scope of the 14th Amendment * * * it must be spoliation under the guise of taxation."